No. 189.

Brief of Mackey for Appellee

Filed Jan. 8, 1898.

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JAMES H. McKENNE
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Supreme Court of the United States.

OCTOBER TERM, 1897.

HENRY M. BAKER, *Appellant,*

vs.

HORACE S. CUMMINGS, *Appellee.*

No. 189.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEE.

FRANKLIN H. MACKEY,
Solicitor.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

HENRY M. BAKER, *Appellant*,

vs.

HORACE S. CUMMINGS, *Appellee*.

No. 189.

BRIEF AND ARGUMENT FOR APPELLEE.

This is an appeal from a decree of the Court of Appeals of the District of Columbia affirming a decree of the Supreme Court of that District, which declared void an alleged assignment by the appellee to the appellant of his interest in a certain part of their partnership business. The court also having directed an accounting, it was found that the sum of $32,772.14 with interest from July 1st, 1895, was due the appellee. The Auditor's report being affirmed (Record, 269) an appeal was taken to the Court of Appeals and was again affirmed by that court. So that the case has been four times before the lower courts and each time the first judgment of the court has been affirmed. The cause is now here on final appeal.

The bill alleges, and the evidence shows, that on the 6th of September, 1886, the appellee, who was an equal partner of the appellant in the practice of law before the government depart-

ments in Washington, signed and delivered a paper purporting to assign to the appellant, in consideration of the sum of $15,000, all of appellant's interest in a certain class of cases then being prosecuted by them before the Treasury department for the recovery of monies due to a class of government officials known as inspectors of customs. The cases arose under a ruling of the Court of Claims (Adams *vs.* U. S., 20 Ct. of Cl., 115), and were called in the testimony "inspector cases." The assignment was made upon the representation of appellant, who admits he had special charge and knowledge of these cases, that the amount of fees earned and prospective in them and accruing to the firm, was about $40,000. Appellee having no knowledge of the matter relied upon the truth of this statement and accepted appellant's offer of $15,000, as his share of the fees, being content to allow a deduction of $5,000 from his share, in other words, to take $15,000 at once instead of the $20,000 later on, which latter amount he was led to believe was all that he would have been entitled to receive under the terms of the partnership. The partnership, however, in the remaining business of the firm continued and was not dissolved until September, 1890.

About two years after the assignment the appellee began to suspect, by reason of facts which had come to his knowledge, that he had been overreached, and that the defendant had misrepresented to him the actual value of his fees in the inspector cases. He thereupon privately prosecuted a thorough investigation in the Treasury department as to the amount of inspector cases on hand at the time of the assignment. He was appalled by the discovery that instead of the fees of the firm amounting to only $40,000 as stated by appellant, they actually amounted to about $100,000, of which, at the very time of the assignment, he now for the first time learned, the appellant had collected about $26.000 in cash and had besides about $25,000 in drafts lying in the Treasury department, awaiting his call, in which latter the firm's fees amounted to about $6,000. The

appellee's share of all this, but for the assignment, would have been about $50,000, and appellant's a like sum. By reason, however, of appellant's misrepresentations and concealment he had received only $15,000 while the appellant received over $85,000. Appellee immediately disclosed his discovery to the appellant and thereupon soon after, (September, 1889,) dissolved the partnership. Some time was consumed in an endeavor to compromise, but, failing to reach a settlement, appellee filed this bill on the 1st of February, 1890, for an accounting, claiming the assignment to be invalid.

That it was invalid upon two grounds there can be no room for doubt, and it was so held by the court below; *first*, void as *nudum pactum*, having no consideration to support it, and, *secondly*, voidable because of misrepresentation and concealment, to say nothing of the gross inadequacy of the consideration, even if it could be treated as a consideration.

First, it was void for want of a consideration, because at the *very time of the assignment* appellant had of the firm's money over $32,000 in cash and drafts, one-half of which, or about $16,000, belonged to appellee as his share. Appellant instead of informing appellee of this, concealed the fact and paid him out of *this very money* the $15,000, as the consideration of the assignment. It is plain that this $15,000 was really appellee's *own money*, money which he was entitled, then and there, to receive of appellant even had the assignment not been made. This being so appellant *paid nothing* to appellee as a consideration for his interest in the inspector cases. He simply paid that which appellee had a right to demand and which appellant was bound to pay ; indeed he did not pay, by nearly a thousand dollars, what apppellee was entitled to. In other words, as the appellee was paid *with his own money* and not the money of appellant, he received *nothing* from him as a consideration for the assignment. It was consequently void, and had no effect whatever to change the partnership relations, and the

rights of appellee in these "inspector cases." The business of the partnership continued in contemplation of law exactly as if the so-called assignment had not been made. Consequently the doctrine of laches so strenuously insisted upon by appellant has no application whatever. The bill is for an accounting and was filed within a few months after the dissolution, and in that accounting the alleged assignment never in point of law having been made (because there was no consideration to support it) is to be as entirely disregarded as if it had never existed. This was the view taken by the court below, where Chief Justice Alvey in delivering the opinion of the court said:

"It is very clearly shown that the $15,000 paid over to Cummings by Baker on the assignment of the former's interest in the inspector cases, was not in truth the money of Baker, but was the money of the partnership of Cummings and Baker deposited in the name of Baker; and that in receiving the $15,000 for his share or interest in the inspector cases Cummings was in reality, and to all intents and purposes, receiving his own money, and not even the full amount due him, for and on account of the inspector cases previously earned, and actually realized or secured. This being so, the assignment of September 6th, 1886, was not only voidable for misrepresentation and failure to make full and frank disclosures of the real state of the business, and the extent of the interest of Cummings therein, as held by the court below, but *it was void from the commencement* and transferred no interest to Baker, because of the entire want of consideration—the $15,000 being received by Cummings in ignorance of his rights. If this view of the transaction be correct, and we perceive no reason to doubt it (Helmore *vs.* Smith, 35 Chan. Div., 436; Brooks *vs.* Martin, 2 Wall., 85), neither the statute of limitations, nor the doctrine of the lapse of time, as defences to the relief sought, would have any application. *The assignment did not break up or terminate the relation of partners; but the partnership continued, not only with reference to the other business of the firm but also with reference to the inspector cases; the assignment to Baker being without legal effect or operation*, and that being so, and the partnership continuing until September, 1889, when it was dissolved, less than five months intervened from the time of dissolution to the time of filing the bill on the 1st of February, 1890."

The money (this $32,000) was deposited by Baker in Corson & McCartney's bank of Washington. It was deposited in his own name, but it is in evidence that it was solely made up of the proceeds from the collected drafts, and the account was, as a matter of convenience, purposely kept in Baker's name. It was none the less, however, the partnership account, and was as much so as if the account had been kept in the firm name. It is admitted that the check by which Cummings was paid was drawn against this partnership fund. And it is not denied that of this money Cummings was, at the time of this assignment, entitled to more than $15,000, the price paid him. What is the law as to this?

The case of Helmore *vs.* Smith above cited is very much in point. In that case during the temporary unsoundness of mind of Helmore, who was a partner of the defendant, the sheriff levied execution against his "chattel interest" in the partnership to satisfy a judgment against Helmore. The defendant purchased it and paid for it by a check drawn on the partnership bank account [just as Baker gave his check against the partnership funds]. At that time there was more owing to the plaintiff from the partnership than was paid by the defendant for his interest. The plaintiff, on recovering his health, brought an action to set aside the sale. Bacon, V. C., said:

"Now, I feel surprised when I am seriously told that a partner can buy out his partner's interest, whether under execution *or otherwise*, with that partner's *own money* for his, the purchasing partner's own benefit. * * * Whose money was it? He cannot say it is his own; one partner cannot say, "Money belonging to the partnership belongs to me." Here the defendant could not even say "*half of the partnership money is mine," because there had been no division; but out of the common stock, which can only by law be dealt with for partnership purposes, the defendant buys the chattel interest put up for sale.*"

The sale being set aside the defendant appealed.

Cotton, L. J., said:

"To my mind the case is to be decided against the defendant, because he did not buy these goods with his own money."

And Lindley, L. J., that master of partnership law, said:

"What makes this particular case easy is this: When the sheriff sold under the *fi. fa.*, he sold to the continuing partner, who did not pay the purchase money to the sheriff out of his own money, but paid for what he purchased out of the assets of the partnership."

And Lopes, L. J., said:

"If the defendant in this case had bought from the sheriff what he did buy with his own money, very difficult questions would have arisen."

So, in regard to Cummings being entitled to receive from Baker his share of the fees already collected by Baker, the case of Brooks *vs.* Martin, 2 Wallace, 70, is exactly in point. This was a case where this court set aside an assignment of fees by one partner to another as in the case at bar, Mr. Justice Miller delivering the opinion of the court said.

"In regard to the adequacy of price, it is obvious that Brooks did not pay Martin anything that he was not bound to pay before the sale was made, or assume any obligation under which he did not already rest. Nor did Martin receive anything which Brooks did not then owe him, or his promise to do anything for which Brooks was not previously bound."

If these propositions of law be correct, it will be obviously needless for this court to examine to any extent the testimony as to the misrepresentations of appellant, because it is admitted by him that he did not tell appellee the status of these cases. He expressly puts himself upon the ground that he was under no obligation to disclose these facts because, as he puts it in his testimony, "it was a trade, just as any other trade" and he

says if appellee did not know as much about the cases and their status as he did, it was because he did not take the trouble to find out. Of course, as we shall hereafter see, this is no defense between partners, but taking him at his word, the fact is admitted by him (in his own accounts, presented to to the auditor) that he had this $32,000 of the firm's money at the time he paid appellee the $15,000. When therefore this court shall have found this to be the case it must necessarily hold as the court below did that the assignment was *ab initio* void for want of a consideration, and consequently affirm the decree below.

The Facts in Detail as Disclosed by the Record.

We have made the foregoing statement *in limine*, because it presents the case upon which we respectfully insist this appeal must be decided. We insist that it is not necessary for this court to examine the record to determine whether fraud, viz, misrepresentation and concealment, has been committed by appellant. It is not necessary, *first*, because if the contract is void for want of a consideration it is entirely immaterial whether fraud was committed or not; and *secondly*, if for any reason the court should be of opinion that the assignment did have a consideration to support it, then we say it is voidable for the misrepresentation and concealment, which the two courts below have declared, after a thorough examination of the testimony, is abundantly established, and this court, therefore, will not, in accordance with its well established practice, reverse that finding of facts even though, as an original question, it should have some doubts.

In Dravo *vs.* Fabel, 132 U. S., 487, it was held that a decision of a District Court on a question of fact, affirmed by the Circuit Court, will not be disturbed by this court unless the error is

clear. And Mr. Justice Harlan, delivering the opinion of the court in that case, said for the court:

"The case comes within the ruling in Lammers *vs.* Nissen (Sup. Ct. Rep., Lawyer's Ed., Book 25, p. 562), where the finding of the court of original jurisdiction, upon a mere question of fact was affirmed by the Supreme Court of the State. Chief Justice Waite said: 'Under the circumstances we ought not to disturb the judgment of the State Court unless the error is clear. No less stringent rule should be applied in cases of this kind than that which formerly governed in admiralty appeals when two courts had found in the same way on a question of fact.'"

What was the rule which "formerly governed in admiralty appeals and which this court now says should be applied to equity causes coming here on appeal when *two* courts have already decided the facts against the appellant?"

Prior to that act of 1875 this court would not in admiralty case reverse on a finding of fact by the court below unless the error was perfectly clear, in case of mere doubt it would affirm.

The Richmond, 103 U. S., 540.
The Junsata, 93 U. S., 337.
The Quickstep, 9 Wall., 665.

Questions of fact only are presented by this appeal. There is no dispute as to the law. *Two courts* have already found against the appellants. It has been over and over again ruled by this court that under such circumstances the burden is on the appellant to show error. Every presumption is in favor of the decrees below. We ought not to reverse unless the error is clear.

The S. B. Wheeler, 20 Wall., p. 386.

Under the act of 1875 in regard to admiralty causes, the facts found by the court below are conclusive; and the only rulings reviewable are such as might be presented by a bill of exceptions prepared as in actions at law. The findings have practically the same effect as the special verdict of a jury.

Alexander *vs.* Machan, 147 U. S., 72.

This then is the law and practice of this court as declared in Lammers *vs.* Nissen, and Dravo *vs.* Fabel; in the first case through Chief Justice Waite, and in the second through Mr. Justice Harlan, viz :

That where two courts of equity have already decided the facts in the case, the first court as an original question and the second court on appeal, the Supreme Court of the United States will not reverse that finding except in the case of most manifest error. It will regard it as analagous to the finding of a jury.

But assuming, as we are bound to do, that the charge of fraud will be denied and the question argued by the learned counsel for the appellant we deem it our duty to present more fully than we otherwise would the facts upon which we rely to establish the charge that this assignment was procured through gross concealment and misrepresentation of fact—the *suppressio veri* and the *suggestio falsi.* In presenting these facts we shall ask the court to take nothing for granted, but shall rely for every statement in regard to the essential proof upon the very language and page of the record.

The Evidence.

The firm of Cummings & Baker was established about the year 1874. From that date until the 6th of September, 1886, the firm had prosecuted with success a large amount of claims against the Government. A great deal of the business consisted in what has been termed in the testimony "Inspector Cases;" that is to say, claims against the Government by inspectors of customs for arrearages of pay growing out of the difference between what the Treasury Department, under its construction of the law, allowed them, and what they were actually entitled to receive under a proper construction of that law. In the division of the business of the office the prosecution of these cases fell to Mr. Baker, because they arose out of the revenue laws, for, as Baker says (Rec., 116), "He,

Cummings, generally took charge of what was known as the old war claims, and I had everything arising out of the revenue laws." Cummings' knowledge of these inspector cases was therefore limited. Baker himself says:

"He [Cummings] undoubtedly understood the general character of the cases. He understood how to calculate in a general way the amount due any individual claimant, and generally, in a rough kind of way, their theory and import; but he took no part in their discussion or in preparing any briefs or argument connected with them, and did very little of the clerical work connected with them." (Rec., 92.)

And Cummings also says the same thing:

"In 1886, Mr. Baker, who had exclusive and entire charge of these cases; who kept all the records pertaining to them in his own desk under lock and key, and about which I knew nothing beyond the simple or general principle on which they were based, wanted to buy me out of these claims." (Rec., 20.)

Again Baker says (Rec., 128) in response to his counsel's examination:

Q. Will you please state whether or not, as matter of fact the general management of these claims was committed to you?

A. I do not know that anything was committed to anybody in the firm. As a matter of fact I did generally manage these cases.

Q. You had a more intimate knowledge in respect of them, because you did generally manage them, I suppose?

A. Because I did the large proportion of the work.

So that we may take it as conceded that Baker knew all about these cases, their character, amount, prospects, &c., and that Cummings knew very little about them. Indeed, Baker is not at all backward in boasting that in respect of these cases he had mastered the entire field of law and fact. Not only this, but he knew their exact status in the departments, for to him fell the duty of prosecuting them.

The business of the firm thus went along—Cummings prosecuting the "war claims" and Baker the cases coming under the revenue laws, until in 1886, when the defendant's cupidity got the better of him. He had been prosecuting these inspector cases now for a number of years and he had acquired an extensive knowledge of all the "ins and outs" of the business. Large fees had been divided between him and his partner on account of them, but still greater fees remained to be collected in the next two or three years. A large appropriation had been made in that year to pay these claims, and the money was being collected by him. Still larger appropriations he knew had yet to be made. He knew, as we shall demonstrate, almost exactly the amount of money which was to be derived from the cases which he had then on file or ready for filing. He knew that the *law* of these cases had been settled finally by the decision of the Court of Claims in Adams *vs.* The United States and Bradford *vs.* The United States, 20 Court of Claims, 115, cases which had been prepared and argued by him before that court. He knew that the prosecution of these cases had now reached a point when the work to be done consisted of but little more than the filing of a letter in each case and receipting for the amount payable. And knowing all this he began to regret being compelled, under the terms of the partnership, to divide with his partner the fees now rapidly coming in and which were yet to come in the future. It is not difficult to conceive Baker working himself into "a frame of mind" on this subject. In his testimony, as a seeming excuse for his action, he endeavors to belittle the services of his senior partner; that issue is, of course, immaterial, but it is curious to observe how, in his efforts in that direction, Baker unconsciously exposes his true motive; having done, as it was no more than his duty to do, the work in these cases he wanted to pocket *all* the fees. To use his own language (Rec,, 93): "I was tired of doing all the work and dividing the money with him." And so he began to importune Commings to sell

him his interest in these cases. The evidence on this subject shows that he goes even further than the plaintiff in describing the persistency with which he pressed upon his partner the proposition to buy him out. He says, both in his answer to the bill and in his testimony, that he placed before Commings the *alternative* of selling out to him or dissolving the partnership. Thus, in his testimony (Rec. 117) he says, in response to questions of counsel: "I mentioned it (a dissolution) in 1885, I am confident. I could not say whether I did in 1884 or not."

Q. Did you in 1886?
A. I did.
Q. Were you insisting upon it at the time that this assignment of the inspector cases was made to you?
A. I was.
Q. Was your insistance as urgent or less urgent than it had been before?
A. It was more so. My point was that I wanted the firm to end.

Again, at the bottom of page 106 of the record, he speaks of his insistance upon a dissolution and says that in 1886 "I again suggested it and *yielded only upon receiving charge of the business*," viz., on Cummings consenting to sell out.

Let it be remembered that we are now making our case from the defendant's testimony alone. Cummings, he says, opposed a dissolution and offered a compromise. "At this stage of the matter the defendant offered to buy all the complainant's right, title and interest in and to the fees in the said 'Inspector Cases,' and offered to pay complainant $14,000 in cash therefor." (Answer, near end of Par. 5, Record, page 10.) Cummings thereupon agreed to take $15,000 and Baker says "upon those terms [selling out for $15,000] the defendant *consented* that the partnership relations, as thus modified, might for the present continue." In other words it was, "You must either sell out to me your interest in these cases or dissolve this partnership."

The law upon this subject is well settled.

"The utmost good faith is due from every member of a partnership towards every other member * * * and most especially is good faith required to be observed *when one partner is endeavoring to get rid of another or to buy him out.*' (Lindley Part. Ewell's ed., bot. page 773.)

It is not worth while to quote from the testimony further than we have done to show, that at the time of the assignment of his interest in the "inspector cases," Mr. Cummings was compelled to rely upon his partner for *all* information in respect to the amount of business present and prospective, and that that partner knew *all* about the business and was, so far as these cases were concerned, the "managing" partner. There is, and can be no difference of opinion as to the law governing partners who are negotiating between themselves for a sale of one partner's interest to the other—*In societatis contractibus fides exhuberet*—is the inflexible rule, and not only *fides*, but *uberrima fides.*

"The same rules and tests are applied to the conduct of partners as are ordinarily applicable to that of trustees; and the duties, functions, rights and obligations of partners may be for the most part comprehended by the same words which define those of trustees and agents." Collyer on Part., § 182; 1 Story Eq. Jur., §§ 468-623; Kelly *vs.* Greenleaf, 3 Story, Rep. 93; Pomeroy *vs.* Benton, 57 Mo., 543, and see especially *Lindley on Partnership*, Ewell's Ed., bottom page 771, Vol. 2.

"The defendant being the partner whose duty it was to keep the accounts of the concern could not, in fairness, deal with the plaintiff for his share of the profits of the concern, without putting him into possession of all the information which he himself had with respect to the state of the accounts between them. The defendant knew from the accounts in his possession that the £1,000 was not an adequate consideration for the plaintiff's share of profits; and he cannot be permitted in a court of equity to maintain advantage which he has gained over the plaintiff's igrorance." Maddeford *vs.* Austwick, 1 Simons (Eng. Cas. in Ch.) 89; opinion by Sir John Leach, Vice Chancellor.

"One who seeks to benefit himself at the expense of his partner must have his conduct tried *by the highest standard of honor.*" Lindley, 771.

"The relations of trust and confidence existing between the plaintiff and himself placed him under an equitable obligation to *communicate* all he knew of the matter then pending to the plaintiff, to 'make a clean breast of it,' to disclose to him all the material facts within his knowledge touching the negotiations then in progress, as fully as though he had stepped upon the witness stand, and nothing short of a complete disclosure of this sort could exonerate the defendant from the charge of undue concealment." Pomeroy *vs.* Benton, 57 Mo., 548; 1 Story Eq., §204 et seq.

Was Baker's conception of the partnership relation in harmony with the foregoing authorities? Did he conceive for one moment that in dealing with his partner for the purchase of his interest, it was his duty to be as open and as frank and as fair as man can be to man? Did he know that *caveat emptor* had no application to a sale between partners? Not at all. On the contrary, he frankly tells us he *acted* on the theory that a purchase by a partner of his co-partner's interest is in no way different from any purchase which a stranger might make from a shop-keeper. Thus he says, on page 94 of the record (middle of page) that when Cummings asked him for advice he replied: "I have no advice to give in this matter. *This is a* trade."

And, again (Rec., 97):

"He asked my advice in regard to it and I distinctly declined to advise him. I said: '*We are trading.*'"

And on page 125 of record, near the bottom:

Q. You regarded it as a matter of trade, in which it was the business of each man *to look after his own interest?*

A. Unquestionably, *just as in every other trade.*"

In the course of this brief, as we shall quote from the evidence, we ask that it be read in the light of this fatal admission of the defendant. It shows the utter misconception by Mr.

Baker of the obligations which grew out of his relation to the plaintiff, and it is impossible to take his testimony and wash out of it the coloring which this admission gives to it. Can a man, upon the point of purchasing an interest in a business and desiring, as all men naturally desire and naturally endeavor, to buy it as cheaply as possible, justify a purchase from his co-partner, whom he admits did not, and could not, know as much about the value of that interest as he did, at the grossly inadequate price he paid for it, when he tells us, "In making that purchase I unquestionably regarded it just as I would every other trade, in which it is the business of each man to look after his own interest?" Is it possible to conceive that a man adopting such a course of action in purchasing his co-partner's interest, of the value of which that partner was ignorant, would hold himself steadily to that high standard of honor, which not only forbids the sightest dissimulation, but commands frankness and fairness in making a full and clear statement to the seller of all the necessary facts from which he may form a sound judgment of the value of the thing he is about to sell? Surely, if Baker's human nature is the same as that of other men, he did not, with the conception he tells us he had his obligations to his partner, on making this purchase, keep to the line marked out by the law for such a transaction. The very inadequacy of the price, if there were nothing else in the way of evidence, shows that he did not.

Repeatedly throughout his testimony, as well as in his answer, Baker tells us (Rec. 103) that when Cummings asked him for advice as to this "*trade*" he declined to advise him.

Q. Did you ever say to him that the trade would be a good one for him or for his benefit?
A. I did not. I did not give him any advice on the subject.

But the fact is *he did advise him*, for when, according to his own statement, after he had offered $14,000 to Cummings for his interest in the inspector cases, and had insisted that he

must sell or dissolve the partnership, Cummings said to him: "Well, Baker, if you *insist* upon something being done and if you think it best for me I will take $15,000," he replied "I think that is *more* than I ought to pay, but you must decide whether it is best for you or not. This is a trade." (Rec. 94, middle of page.)

Again on page 97, near bottom:

"The next morning he (Cummings) came to the office and said he had been thinking it over and if I was a mind to give him $15,000 he would trade. I said that was *more* than I could afford to pay, but to end the matter and have an end of the whole thing I would give it to him."

Here again we have in Baker's admission that Cummings sought advice of him a strong corroboration of Cummings' testimony that he had the utmost confidence in Baker's fairness, for certainly no man, unless he believes in the fairness of the purchaser, will actually propose to follow *his* advice in the consummation of the bargain. If he thought him dishonest, doubted his fairness, believed him to be a trickster, would he not act rather upon his own judgment or seek the advice of others? The extent of Cummings' confidence in his co-partner is shown by the testimony (Rec. 28, top of page).

"I will say that I had every confidence in Mr. Baker up to that time that I ever had in any man living. As I have often said that if I was going to leave the country and be gone for four years, I would not hesitate to take all my property and securities and put it down on Mr. Baker's desk and say, 'Mr. Baker, I am going to be gone for some time,' and when I came back again I have no doubt that I would have an entire and true accounting for the whole thing."

Now, with his admission of Cummings' confidence in his sense of fair dealing, he tells us that he told him "fifteen thousand dollars is more than I *ought* to pay you," "more than I can *afford* to pay you."

When one partner, having full knowledge of the value of his co-partner's interest, proposes to the latter, who is without such knowledge, to purchase his interest in the business of the firm and tells him that $15,000 is *more* than ought to be paid for it, "more than he can *afford* to pay for it," are not such statements equivalent to saying "$15,000 is more than it is *worth*," and yet Baker knew at the very time he was making these statements that he was making a serious misrepresentation of fact. It was more than a *supressio veri*, it was the *suggestio falsi*, for he knew that he had at that time in his pocket nearly $16,000 in fees belonging to Cummings and over $70,000 more of fees absolutely certain of collection, one-half of which would belong to Cummings. It was not a frank, fair, truthful representation, and, unless he can convince the court that it was, he cannot maintain this assignment, for a court of equity will protect the confidence which should exist between partners dealing with each other and will insist that they *shall* be frank, fair and truthful in their representations. Baker *knew* when he told Cummings that $15,000 was more than he ought to pay that he was *misleading* Cummings as to the true value of his interest. Nay, he knew that he was buying out Cummings with his (Cummings own money and not giving him all of it either. For the actual transaction as disclosed by the drafts in evidence was this. At the time of the assignment drafts had already been issued on account of these inspectors cases in a sum large enough to pay the firm $31,488.70 in net fees, and over $26,000 of these fees had been turned into cash by Baker and placed in the bank to the credit of an account standing in his name, but which was really the firm account. The rest was in drafts ready for delivery. Cummings' share of these fees, due him at that very moment, was $15,744 35. In addition to this the aggregate amount of fees in cases then on file, or ready for filing, was $71,743.51. Had Cummings refused to sell out to Baker, his share of these fees would have been over $51,000. So that Cummings

actually made a present to Baker of over $36,000 for the privilege of getting $15,000 of his own money, a sum less by $744.35 than was at that very moment due him had he demanded of Baker a division of the fees collected up to that time. And yet we are asked to call such a transaction so fair that it can be tested by "the highest standard of honor."

Where no such confidential relations exist between vendor and vendee as exist between partners when one is attempting to "buy out" the interest of the other in the partnership, a party to a sale (the ordinary commercial bargain) is not required to disclose all facts which he may have in his possession not known to the other party, and which might operate to change the latter's course of action, yet his conduct in this respect must be of a purely negative character, he is not compelled to disclose the facts, but if he do any *act* or say *but a single word* calculated to *mislead* the other party as to the true state of facts, the later is entitled to have the contract rescinded in a court of equity. Thus, in Livingston *vs.* Peru Iron Co., 2 Paige, 390, Chancellor Walworth, in dealing with a case of this sort, said:

"It has been questioned by many whether the suppression of a material fact by the one party, of which fact he knew the other to be ignorant, was not of itself sufficient to avoid the contract on the ground of fraud. * * * Although our courts have not gone that length, yet even in this state *very slight circumstances*, in addition to the intentional concealment of a fact, have been considered sufficient to constitute a fraud upon the other party. * * * And in a recent case before Lord Eldon (Turner *vs.* Harvey, Jacobs, R. 178) he adverts to the general principles that parties dealing for an estate have a right to put each other at arm's length; and that if the purchaser knows there is a mine upon the estate, and the vendor makes no inquiry, the former is not bound to give him information thereof. But, he says, '*very little* is sufficient to affect the application of that principle. If a word, if *a single word* be dropped which tends to mislead the vendor, that principle will not be allowed to operate.'"

Therefore, in that case he held that the plaintiff (Livingston) was entitled to rescind the sale, because the defendant (Palmer) having discovered a valuable mine on the lands of Livingston, which were then wild and uncultivated and remote from the residence of the latter, represented the land as being only fit for a sheep pasture and stated that he desired to purchase it for that purpose, although he really desired it because of the valuable mine which he had discovered upon it. "By this deception." said Chancellor Walworth, "the vendor is thrown completely off his guard, and he contracts to sell the land at the usual rate or price of rough broken land in that region, instead of directing his agent near the premises to inquire and ascertain its true value."

So in the case of Hill *vs.* Gray, 1 Starkie, Rep. 352, which was an action of assumpsit to recover the price of a picture. The defendant at the time of purchase had pressed the plaintiff's agent, one Butt, to inform him whose picture it was, which the latter refused to do. Butt was at that time employed in selling a number of pictures for Sir Felix Agar, and the defendant, misled by that circumstance, erroneously supposed that the picture in question was also the property of Sir Felix. Butt knew that the defendant labored under this delusion, and without attempting to remove it, permitted him to purchase the picture under this misapprehension. Plaintiff offered to prove that the picture was really a valuable one and had been painted by the artist Claude. But Lord Ellenborough said: "Although it was the finest picture that Claude ever painted it must not be sold under a deception. The agent ought to have cautiously adhered to his original stipulation, that he should not communicate the name of the proprietor, and not to have let in a suspicion on the part of the purchaser which he knew enhanced the price. He saw the defendant had fallen into a delusion in supposing the picture to be Sir Felix Agar's and yet he did not remove it;" Here not a word was spoken, but the mere *act* of the defendant's agent in placing the picture among other

pictures of Sir Felix Agar's, *tended* to create the impression that it also was Sir Felix Agar's. Therefore when the seller saw that his own act was creating a delusion it was his duty to remove it.

So in the case of Laidlaw *vs.* Orgon, 2 Wheat., 178, one of the parties was about to purchase from the other at New Orleans a large quantity of tobacco. The vendee had just received news of the signing of the treaty of Ghent, which declared peace between the United States and Great Britain, Knowing that this fact would cause a great rise in the price of tobacco, he called upon the vendor at early sunrise of that morning, before the latter could learn of the treaty, and began to negotiate for the purchase of the tobacco. Before the sale was consummated, however, the vendee asked the vendor if there was any news calculated to enhance the price of tobacco. No answer was given to this question and the purchase was effected. Upon these facts Chief Justice Marshall said: "The question in this case is whether the intelligence of extrinsic circumstances, which might influence the price of the commodity and which was exclusively within the knowledge of the vendee, ought to have been communicated by him to the vendor. The court is of opinion that he was not bound to communicate it. It would be difficult to circumscribe the contrary doctrine within proper limits, where the means of intelligence are equally accessible to both parties. But at the same time each party must take care *not to say or do anything tending to impose upon the other.*" It was therefore held that the question whether such imposition was practiced should have been submitted to the jury.

Thus we see that even where the parties are dealing at arms' length, while it is permitted to the knowing party to remain silent, yet, if he utter *so much as a single word* or do any *act*, however slight, calculated to mislead the other who is ignorant of the material facts, the latter is entitled to have the contract rescinded, Nor is it necessary that the word spoken, or

the act done, shall have been with the *intent* to deceive or mislead; it is sufficient if it have that effect.

"The general rule of equity is that any contract, of however solemn a character, may within certain limits be rescinded for constructive and, a *fortiori*, for actual fraud; and to state the matter with reference to the title of this section, any contract may be rescinded for *innocent* representation which was sufficient inducement thereto. The 'fraud' upon which a proceeding to effect recission is based is found in the purpose, or it may be the actual attempt to enforce the contract after knowledge of the falsity of the party's representations has been brought home to him. Knowledge at the time the representations were made that they were false, only makes a stronger case; it is not essential." Bigelow on Fraud, Vol. 1, p. 411.

If parties thus dealing at arms' length are to be held to such strict accountability for misleading, by word or act, the other party to the contract of sale, *a multo fortiori*, will parties occupying a confidential relation to each other be held to such accountability? We are not to be surprised, then, on finding that the law requires a party occupying such a relation to go even further than the ordinary seller or purchaser. While the duty of the latter is merely negative, there being no obligation to impart information, provided he neither says nor does anything to mislead, the former has imposed upon him the positive and affirmative duty of fully disclosing every fact within his knowledge calculated to affect the conduct of the other party over the subject of the contract. And though the maxim, *simplex commendatio on obligat*, the mere "trade talk" of merchants applies to the ordinary bargain and sale, it has no application, says Mr. Bigelow, in his work on Fraud, Vol. 1, p. 496, to a case "where one of the parties to a sale *assumes to have special knowledge* of the value of the property, in regard to which the other being known to be ignorant, trusts entirely to the good faith of the former, to the former's knowledge." In such a case he says: "It may be very proper to treat *representations of value* as standing upon

the same ground as representations of facts." That is to say, a misrepresentation of either, whether knowingly or innocently made, is a ground for rescission.

This exception to the rule of *simplex commendatio* applies for even greater reasons to a purchase by a partner having knowledge of the value of the interest he is purchasing from a partner not having such knowledge. There can be no "trade talk" between such parties. When the purchasing partner with knowledge says to the selling partner who is without knowledge, "I am paying you more than I *ought* to pay," or "more than I can *afford* to pay," it is a misrepresentation of fact if it be not true.

We have no doubt the defendant will say: "But it *is* true. It was more than I ought to pay, for I had done all the work in these cases and Cummings really did not deserve even what I offered him, and that was what I meant when I used those words, 'It is more than I *ought* to pay.'" Well, we know that even if he had meant them in that sense the statement was not true, because under the terms of the partnership agreement Cummings was entitled to one-half of these fees without regard to the work he did in respect of them, and, furthermore, the defendant has given his meaning to these words, "more than I *ought* to pay" by using them in another form, "more than I can *afford* to pay," and he himself must admit that *that* was not true, for he was paying Cummings with the latter's own money. But conceding for the sake of the argument that the expression was true in the *sense* that the defendant claims to have used it, that fact cannot avail him as a defense; for—

"The rule fixing liability for false representation, assuming the presence of other elements, is not to be evaded by any suggestion that the representation is *capable* of being understood, as by a merely literal interpretation, or by some forced meaning, in a sense to make it true. If it wear a garb which, under the circumstances would deceive a man of fair intelligence, it is false under the law." Bigelow on Fraud, Vol. 1, p. 503.

So that it is not what Baker meant, but what Cummings thought he meant, which fixes the meaning of these words: "It is more than I can afford to pay you." Cummings with the confidence which we have seen he had in Baker—"every confidence," he says, "up to that time that I ever had in any man living," (*ante* p. 13)—a confidence which the law allowed him to impose, had a right to believe, and did in fact believe, as he tells us, that Baker's statement was true, viz., that his one-half interest in the inspector cases was worth about $15,000. Mr. Justice Hagner in his opinion rendered in special term of the Supreme Court of the District in this case (Rec. 213) well states the law upon this declaration of Baker's to Cummings.

"His declaration that $15,000 was 'all he ought to pay,' or 'could afford to pay,' uttered by one partner to another about a subject with which he was presumably familiar, cannot be regarded merely as the *simplex commendatio* of a seller in an ordinary bargain and sale, even between strangers dealing at arms length, but must be considered as a distinct assertion of his belief; which, as was said by Judge Story in Stubbs *vs.* Eddy 4 Mason, 423, 'is an affirmation of a fact, that is, of the fact of belief; and if it is fraudulently made to mislead or cheat another, to abuse his confidence, or blind his judgment, it is in law and morals just as reprehensible as if any other fact were affirmed for the like purpose. The law looks not to the nature of the fact averred, but to the object and design of the affirmation.'"

But we are told that Baker was buying an interest in a class of cases that depended on a contingency and took a consequent risk. Was it a contingency? By no means; for every one of these cases were as certain of payment as a government bond is of redemption. The law affecting them had been settled by the departments and the courts. Their collection was but a matter of departmental routine and there was not a failure to collect a single one of them. But suppose we admit for argument's sake that these uncollected cases were contingent. Nay, suppose we admit that every single one of those not then allowed and appropriated for would fail of allowance or appro-

priation, what would have been the result? Why even then Baker would have been $744.35 ahead of his "trade." He had absolutely that much ahead in any event, for $15,744.35 was the net amount which had already been appropriated of Cummings' share of the fees, and $15,000 was all that he paid him for his interest. What risk did he then take? It is folly to speak of risk when the purchase is made with the seller's own money and if there is anything more certain than another in this case, it is that Baker never invested so much as *one dollar* of his own money in this "trade" with his partner, but on the contrary used Cummings' own money with which to "buy him out," money which it was his duty to have told Cummings was then due him whether they made a "trade" or not.

This question of contingency was also discussed in Brooks *vs.* Martin, *supra*, where Mr. Justice Miller, speaking for this court said:

"It is said that the soldiers would seek to reclaim the warrants or the lands on which they had been located, under the provisions of the act of 1847, already mentioned, must have detracted largely from the amount which any prudent man would have given for Martin's interest in the concern. This danger was, however, a very *remote* and *improbable* one, and must have so appeared, when we consider that these claims have been bought from young men scattered over the different States of the Union, with no means of ascertaining where the warrants were located or in whom the title was vested; and that the amount in each case, separately, was not worth the trouble and expense of the search and subsequent litigation."

Now, what was the condition of these inspector cases before the Department at the time of Cummings alleged assignment? Twice their validity as a just and proper claim against the United States had been decided by the Court of Claims. In obedience to those decisions, for over ten years the Treasury Department had been allowing, and Congress regularly appropriating, the amounts necessary to pay them as fast as they could be settled. *That very year* an appropriation

of $130,000 had been made to pay them and Baker had collected nearly all of it; indeed, enough to pay him $744 more than he paid Cummings for his entire interest—past, present and future. It was as certain that the remaining claims would be paid as it was that the Department would, in the due routine of business, allow them. What other contingency was there? Was it that his clients would seek to cheat him of his fees? No; because he had that under control by his powers of attorney. But suppose he had not. It was, in the language of Judge Miller, "too remote and improbable" that any thing like this would or could occur, and it is not shown in evidence that he ever lost a dollar by a refusal of a client to pay his fee; but if it had occured so that every one of these inspectors had in some way, which we cannot imagine, cheated him out of his fees, so far from being a loser he would still have been, as we have seen, $744.35 ahead. So much for the contingency there was about it.

Baker's answer and testimony are filled with slanderous averments and petty accusations against his partner of fifteen years, all of which are, of course, denied and proven to be false; but if all of them were true they would help, rather than hurt, the plaintiff's case, for the more neglectful, inattentive, careless and ignorant of his business Baker can show his partner to have been, by just so much more was it incumbent upon Baker to see that that ignorance was not used by him to his partner's detriment, when they were "trading" with each other. If Baker had said to him, "Well, if I got the best of you it is your own fault, you had the same chance to find out the value of your interest that I had, and if you did not do so you cannot blame me for looking out for myself," it would not have been the first time that such an expression has been used by men who have made what, for a compromise with their conscience, they call "a good bargain." In point of fact Baker does say something of this sort. In his answer (Rec. 10-11) he says:

"This defendant further avers that *his knowledge of these cases was derived solely from his study and work;* that complainant *could have had an equal knowledge of them in the same way*, and that frequently defendant asked complainant to render services in connection with them, and that more frequently than otherwise the complainant neglected to do so. This defendant says that at all times the complainant, prior to his sale to the defendant of all his right, title and interest in said 'Inspector Cases,' had full and free access to and use of all agreements, books, papers, records, and all other memoranda, which pertained to, or in any manner had any connection with those cases, and that *if the complainant did not avail himself of the opportunities that surrounded him in regard to them, he is alone to blame*, and any attempt to censure any one else comes with a very bad grace from the complainant, having within his knowledge the truth of the facts herein set forth by the defendant."

But the negligence of his co-partner, in acquiring independent information, even if under the circumstances of this case it was negligence, will constitute no defense for overreaching him.

"It is no excuse for, nor does it lie in the mouth of the defendant to aver, that plaintiff might have discovered the wrong and prevented its accomplishment had he exercised watchfulness, because this is equivalent to saying: 'You trusted me and therefore I had a right to betray you,' *vigilantibus et non dormientibus equitas subvenit*, is without application here, it only applies where party being apprised of, slumbers upon his rights." Pomeroy *vs.* Benton, 57 Mo., 543.

Similar language is used by the Supreme Court of the United States in Kilbourn *vs.* Sunderland, *post.*

Upon the same principle it is no defense to say that he gave the plaintiff certain papers and documents "with the remark that the defendant would tell him any thing in regard to them or answer any question in regard to them which he, the complainant, might ask," and that the defendant never asked him any questions, or that he answered all that he asked. (Ans., p. 17.) *He must not wait to be asked*, but of his own motion he must put the plaintiff in possession of all the facts and all the

information he himself possesses. Because the complainant may be negligent or careless enough not to ask is no reason why he should fail to tell. But, as we have seen, he substantially admits that he did undertake to tell—falsely however,—the appellee what the value of the interest was—"the value is such that $15,000 is more than I can afford to pay," which is the same as saying "$15,000 is much more than your interest is worth."

There is, however, of all the really *material* facts in the case but *one* averment of the plaintiff which is denied by the defendant. The partnership, the assignment, the amount of fees collected at the time of the assignment and the amount of fees collected afterwards are all admitted, the one material fact charged by Cummings and denied by Baker is:

That Baker represented to him at the time of the assignment that the amount of fees already earned were only $20,000, instead of $32,977.51, as they really were, and that the claims on file out of which fees were to be subsequently collected amounted to only $80,000, instead of $250,000, as was the actual fact.

If Cummings tells the truth about this there can be no question as to his right to have the assignment set aside. Let us therefore examine the evidence upon this subject.

In the first place it is to be observed that in the nature of things there can be but two witnesses to what representations, if any, were actually made by Baker to Cummings. They both agree that no third person was present. Cummings on the one side and Baker on the other must ever remain the only witnesses to the conversations had between them which resulted in this assignment. How shall we reach the truth of the matter? The answer is plain.

1st. By testing the credibility of the witnesses by the evidence they have given as to the known facts of the case.

2d. By the probabilities of the case.

And, first, as to the question of credibility. If we exclude Baker's denial of this material fact, there is not a single fact

material to the issue sworn to by Cummings, either in his testimony or the bill of complaint, which is not either admitted or proved to be substantially true. We challenge the learned counsel for the defense to a successful contradiction of this statement. On the other hand, how is it with Baker? Let us take up his answer to begin with. Cummings had stated in his bill that the fees he was entitled to receive at the time of the assignment were more than $16,000. The list of drafts in evidence is conceded to be correct, and they show that at the time of the assignment the fees due the firm were $32,971.51; one-half of this, or *over* $16,000, was Cummings' share. Before filing his bill, Cummings had ascertained this fact by an examination of the drafts in the Treasury Department. He had no such schedules, such as Baker had, to enlighten him as to the facts, and therefore could not know that this $32,971.51 was subject to the small deduction of $1,488 on account of fees paid other attorneys. Consequently, he told substantially the truth when he came within $256 of stating his share of those fees at over $16,000. Now, how does Baker deal with this matter? In his answer, beginning of paragraph 7, he says:

"That when the complainant stated that he (complainant) was entitled to more than sixteen thousand of the fees in the cases appropriated for at the time of the said bargain and sale, that he (complainant) said that which complainant had every opportunity and reason to know was false."

Baker had in his possession, when he wrote this answer, the schedules, prepared by himself, which showed that Cummings' statement was substantially correct. So that it is Baker in this instance and not Cummings, who "stated that which he had every opportunity and reason to know was false."

Again, Baker denies most emphatically in his answer, and he does so in more than one place, that he ever stated that the remaining cases would amount to about $80,000.

"This defendant further denies most positively that he ever stated to the complainant that the remaining cases would amount to about eighty thousand dollars. This defendant *had made no computation* relative thereto and could not have so stated." (Answer end par. 6, Rec. 13.)

And so in his testimony—

Q. Had you ever made any computation as to the aggregate amounts due on the cases filed and submitted?
A. Nothing. Only a general calculation of each case when filed. I had not *aggregated* them. (Rec. 101, top of page.)

If Baker had made no computation, it was not because he thought the computation was difficult; nor because he had not the material with which to make it, for according to his own statement he had "all the books, papers and documents" from which to make such a computation, and the fact is, notwithstanding his statement to the contrary, he did make such a computation, unless he desires us to disbelieve his further statement in the same answer; for elsewhere we find him swearing with equal positiveness to a deliberate statement which scatters to the four winds his equally deliberately sworn statement that he had made *no computation*. In his answer (Rec. 11, bottom of page), after stating that he gave Cummings certain books, papers and documents to take home with him and from which he might make his own computation of the inspector cases, he says:

"The defendant further says that these books, papers and documents were all the books, papers and documents, except the Statutes of the United States, which the defendant *used to ascertain the nature and amount* of the 'inspector cases,' and that they were full and ample for that purpose."

If this statement is true then he *had* made a computation and ascertained "the nature and *amount* of the inspector cases," and the statement that he had "made no computation relative thereto" is false, or vice versa. Can the credibility of such a

witness be relied on to explain away the enormous unfairness of this "trade?"

He says that by means of the documents which he gave Cummings the computation was an easy one.

"It was a very easy matter. It ought to have been done by any one with the possession of the data furnished the complainant, in two days time at most."

Q. Would it have been any more laborious to calculate the cases filed than the cases outstanding?
A. Certainly not. (Rec. 102, bottom of page.)

The wonder is how this defendant can swear so positively as to the ease with which the computation could be made when in another breath he swears he never—no never—had made it himself. But is it credible—indeed is it not perfectly incredible, that a man should pay $15,000 for an interest in any business without having made "a computation relative thereto," especially when the computation was "a very easy matter." Men do not buy in that way an interest in a business involving thousands of dollars, unless they are morally certain that the value of the interest largely exceeds the price offered, and if Baker was of that mind, then he certainly committed a fraud on Cummings by not telling him so. Neither does a purchaser trade in that way when he is of the opinion that each man must look after his own—not the other's—interest; at least, a man does not who can say to the seller, "I will not advise you, for we are trading. You must act upon your own judgment." Upon whose judgment did Baker act, if he had made no estimate of the value of the thing he was paying $15,000 for?

At least two weeks before this "trade" Baker had made a schedule of the cases already appropriated for (Exhibit H. M. B. No. 3, Rec. 174), showing in columns of figures everything about them and the amounts due. He tells us (Rec. 94, near bottom of page) that by adding up six columns of the figures

of this schedule any one could tell at once what the fees amounted to, and yet he would have us believe he never did it. It is remarkable, too, that he kept this schedule from Cummings until *after* the "trade" was made. This schedule will come up again, however.

But strange as it may seem to us how a man with Baker's intimacy with these cases and on the point of paying his partner $15,000 for his interest in them, should have made no computation of the value of that interest, yet it is not nearly so incredible as his statement that Cummings, the partner who he says asked him more than once for advice as to whether it was best to take $15,000 for his interest or not; the partner who had never worked in the cases (for Baker "did all the work"), the partner who knew them, as Baker himself admits, "only in a general way;" the partner who was hesitating for weeks whether to sell or not, never once—no, not once—that Baker "remembers," ever asked him what the aggregate of the cases was.

Q. Did he ever ask you for the aggregate net amount of the cases then being paid?
A. He did not, he had the documents which showed it.
Q. Did he ever ask you for the aggregate of the cases then filed and in the process of adjustment and of the outstanding cases?
A. *Not that I remember.* (Rec. 103.)

Observe that Cummings (according to Baker's own testimony) is asked to sell out his interest in these cases; before he concludes to sell he asks Baker for advice about it more than once. And yet he never once says, so far as Baker can "remember," "Well Baker how much do you think these inspector cases amount to, are there ten, twenty, thirty, forty, fifty thousand dollars of them left?" If Cummings, groping in the dark and begging for advice, did not ask his partner who knew all about these cases, who had worked alone in them for nearly ten years, and who had filed every one of them, for some idea

of their aggregate amount, then Cummings' mental make-up is different from that of any reasonable being under heaven.

On the other hand, Cummings says in his testimony that he *did* ask Baker for the aggregate and that it was given in the figures heretofore stated. Baker it will be observed does not venture upon a categorical denial of Cummings' statement, he limits himself to "Not that I remember." The positive affirmance of a credible witness cannot be overcome by a mere "*non mi recordo*" answer.

But there is yet a still stronger circumstance going to show that Cummings tells the truth as to Baker's misrepresentations of the aggregate of the inspector cases. The defendant has offered in evidence a paper written by the plaintiff shortly after the sale of his interest which on its face shows itself to be a sort of private diary of the days when wounded by the importunities and criminations of his partner and with sensibilities wrought into quickness by the injustice of his treatment he brooded over it and wrote down, according to what he tells us was a habit of his, his ruminations upon the subject. This paper, which he entitles "Thoughts and Meditations" was never intended for human eye, and was only shown his partner about three years afterwards in a moment of ebullition of feeling. Time had made its disclosures, and he wanted to justify himself by reading his meditations of those days to the man who had been the subject of them. Baker asked to be allowed to take the paper for a few days, presumably for a more quiet reading. In confidence it was given him and in violation of that confidence he gives it to the world by offering in evidence an unauthorized copy of it. By doing so the pit which he dug for his neighbor he has fallen into himself. For if ever out of the fulness of a man's heart the truth must eminate it eminated from Cummings when he privately put in writing his meditations upon the occurrences of those days. A man may deceive others but he does not lie to himself. A thousand times more credence must be given to the entries in a private diary than to

the contrary statements of a man who has thousands of dollars at stake upon his testimony. Let us see then what was entered in this diary so far as it is material to the issue now raised. It is Exhibit H. M. B. No. 2, and begins at p. 94 of the record.

"In the beginning of 1886, this year he would ask me how much I would take for my share of the inspector cases, and would say that he had done most of the work on them and should have the fees.

Baker never said anything about the matter till it looked that my insurance and lost time cases would be a failure. It was in January that he first made a proposition, and I made no reply. In August he brought it up again, and insisted on his having the greater part of the fees.

Baker in August proposed that we divide all fees on cases taken by us prior to January, 1885, and after that date he should have all the fees, and I gave him no reply.

Again, same month, proposed it, and I told him that I recognized that he has done more manual work for the firm in the last eighteen months than I have, but it was because I had already allowances for more than $25,000 fees, and have cases, $50,000 new ones taken by me since January 1, 1885, and my cases, if allowed, will give me more than $50,000 fees, but that it is no use in having cases adjudicated then.

Baker has worked well, but it has been on one class of work; that is, writing to the inspectors; the same sort of letter, he has their address, and the whole business could be done by a woman in five days in a month, at $10 a month. But, no; he must do all this writing himself, and I do not call it work, but simply wasting time that he could employ better.

In my cases I do not know where the parties live or did live or who the real parties are in many cases.

August 19, 1886, Baker again pushed the matter, and said he would give me $15,000 for my portion of the fees in the inspector cases.

I say I do not believe in any such thing, and say that I do not know what powers we have or what percentage we have, what have been allowed or what will be allowed in future, and he said, "There are the powers; pick them out."

I try it, but could make no headway, as he had had control of the matters himself, and I have been kept in ignorance of their condition; he always keeps the powers or contracts locked up; he keeps all data of what has been paid locked up.

He says that a large percentage has to be paid to other attor-

neys, and in many cases the fees are 10, 15 and 20 per cent., when I had supposed that nearly all were to pay 25 per cent.

I ask him specifically what he estimates the fees will be, and he has distinctly said that he did not think the fees in the cases allowed would be more than $20.000, and he says that there will not be allowed hereafter more than $75,000 at the most.

August 26, Baker still persistent, money is not everything. I do not wrong Baker or any other man. I do not want trouble with him; life is too short to make it a money grabbing game, and to please him I do, or have made up my mind to what I consider an unjust thing to myself; but if he can afford to do wrong I can afford to suffer. I tell him, relying on his statements as to the amount of fees that will come out of the cases just paid by last Congress; that is, he said the fees were not over $20,000, and that not more than $75,000 will be allowed hereafter; that I will do one of three things: I will take $15,000 for my interest, or I will take one-half fees in all cases held by us prior to January, 1886, or that I will take one-third fees in all cases, inspectors, and I depend on his doing what he thinks is best for me and my interest, as he knows about the situation of the cases and their prospects.

September 7, 1886, Baker gave me his check for $15,000, saying that was best for my interest, and I depend on his honesty as to representations. This settlement on his statements will give $15,000 out of the $20,000 fees on present settlements, leaving him only $5,000 out of this batch; but, as he says that the future payments will be about $75,000, on which he will get, calling the settlements $80,000, $20.000 of fees, that will give him $25,000 to my $15,000, or $10,000 more than mine, and that is fair looking at the matter from his point of view.

Wonder how will it come out. What have I done wrong. Baker complains, I did do one wrong thing, and that was when I did not go into the post-office cases, and I wanted to, and talked with Baker about it, but he said we had better not, that we had a good thing in the inspector cases and better not cut into Spalding's business; we would not like it if any one of our friends did so by ours, so I dropped it, and now Baker has dropped me out.

Is it right, but what is the use of fighting.

Baker partnership was of his own seeking, not mine (sic) wish. I have never asked his aid, borrowed one dollar, asked his name or endorsement, or his help in any way, shape or manner, I have been careful not to do so, on the other hand I have loaned him thousands of dollars, raised thousands of dollars for him, gotten his paper cashed, &c.

He has never lost one dollar by me, or by any friend of mine or by one that I introduced to him. I have lost thousands by those that he introduced me to, depending on the character he has given them.

Suppose my cases had gone through and his had been stopped as my (cases) have been, would he have been as anxious to do this unjust act?

If the allowed and paid cases give more than say $26,000 fees, in place of his stated $20,000, he has simply deceived me; if future allowances for more than $100,000, he certainly misstates knowingly.

I won't condemn too hastily.

September 7, 1886.

Now Baker, a few days after this paper was loaned him, handed Cummings his answer thereto (Ex. H. M. B. Nos. 10 and 11, Rec. 195); the latter is a very voluminous paper and has been offered in evidence by him. Of course it cannot be received as evidence *for* him, but may be used as evidence *against* him. It is really worthless for either purpose, except in one important particular, and that is that although it will be found to contain numerous denials of the various statements made by Cummings in his "meditations," *nowhere does Baker make denial* of the specific charge that at the time of the negotiations which were consummated by the assignment, he told Cummings that the fees in the adjudicated cases amounted to $20,000 and that the cases yet to be appropriated for amounted to from $70,000 to $80,000. Nor, when in 1889 Cummings writes him a letter containing the same charge does he in his reply deny it, although his letter is written in answer to the accusation that he had misstated the facts. Nor will any denial of this statement of Cummings as to the figures named be found in any of the defendant's letters in evidence. The *first* time that such a denial appears is *after* the bill was filed and when it became absolutely necessary to deny it in his answer or give up his case. We submit with earnestness that all the *circumstantial* evidence of the case supports the contention that credence must be given to the plaintiff's rather than to the

defendant's statement as to what was said about the aggregate of the cases.

So, too, on the question of credibility, we have Cummings' statement that Baker told him not to put the $15,000 check in bank immediately, because there was not enough money to meet it. Baker both on direct and cross examination emphatically denounces this as false, and says that he had enough in bank to meet the check." (Rec. 95 and 118.) After repeated efforts to keep the only testimony from the Court which would establish the truth or falsity of this statement, we get the bank Cashier's testimony, and he shows by the record that it is Baker's, and not Cummings' testimony which is false.

So much for credibility; now as to probability. As we have already said, it is as incredible to suppose that these partners did not talk over together the matter of the aggregate of these cases as it is to believe that Baker had not, with his constant handling of them, through schedules and lists prepared by him, and Treasury Registers and what not, made some calculation as to their amount, especially as he was about to buy out his partner's interest in them. He says, in his answer as well as in his testimony, that his agreement to give $15,000 was *based* upon Cummings' offer to take one-third of the fees in the future; how could he have "based" his offer of $15,000 as equivalent to a division of future fees on a certain proportion unless he had made some *calculation* of the amount of those fees from the data in his possession, which data he admits were simple and the calculation easy? Let his astute counsel answer this if he can.

If the Court believes as, we submit, reason, common sense and our knowledge of the course of business men in such matters, compel us to believe, then it must believe that Cummings tells the truth when he says that he asked Baker for the aggregate of the cases, and that Baker is wilfully misstating the facts when he says that Cummings not only never asked him about it, but he himself never had made any computation rela-

tive thereto. If, therefore, Cummings has told the truth about this matter, and Baker the contrary, shall we, notwithstanding, believe Baker's, and disbelieve Cummings', further testimony that the amount stated to him by Baker was $20,000 in fees in allowed cases and $80,000 of cases pending, out of which fees were yet to be obtained? It is, we submit, perfectly apparent that some statement, whether this or some other, of the *aggregate* amount of these cases must have been made by Baker. Now, if he stated the *true* amount, Cummings, unless he is an idiot, would never have sold out for $15,000, because he would have known that his share of the fees *then due* and payable to him amounted to *more* than $15,000, to say nothing of the $36,000 in fees which he would derive from the cases not yet appropriated for by Congress. The fact that the record shows Cummings to be a lawyer, a college graduate and a man of business standing in the community, excludes the hypothesis of idiocy, and, therefore, the sylogistic conclusion follows that the *truth* was not told by Baker as to the aggregate of these cases. Then if the truth was not told him, it makes no difference whether Baker made the misrepresentation wilfully or not; if he even made it believing it to be true, yet, as it has turned out false, he cannot be permitted to benefit by it.

"It is not material whether or not the person making false representations upon which another acts to his own disadvantage, knows them to be false; the assertion to the injury of another of that *not known to be true* is equally reprehensible in law as in morals with the assertion of that known to be false." 1 Story Eq., § 193. Pomeroy *vs.* Benton, 57 Mo., 548, a partnership case.

"Where a managing partner in the settlement of the partnership accounts, with a view to a sale of his interest, makes a representation relative to the extent of the liabilities of the firm, upon the faith of which his co-partner, who has no actual knowledge of the partnership affairs, purchases his interest in the concern and assumes the payment of the debts due by the firm, which representations turn out to be untrue, whereby his

co-partner sustains a loss; the latter may have relief in chancery, and it is immaterial whether the representation was *intentionally* or *innocently* made. Hopkins *vs.* Watt, 13 Ill, 299.

"Where parties deal with each other touching the partnership affairs, and their means of knowledge relative to the situation of the firm is not equal, he who has the superior information must not make any representations which are untrue; if he does, a court of chancery will interfere and relieve the injured party *although the partner making the representations was not guilty of fraud in fact.*" *Id.*

The Suppression by Baker of the Schedule, Exhibit H. M. B., No. 3.

Cummings tells us in his testimony that when Baker handed him certain papers and documents, including a so-called schedule of cases, that he took them home with him to try and figure out for himself what the value of the interest was which Baker wanted to buy. He says that after making the effort he found that it was impossible, and so told Baker. Baker admits he asked him for advice when he brought the papers back, but, he says, he refused to give it. He testifies (Rec. 93, bottom of page.)

"I said: Well, Cummings, what conclusion did you come to? He said: *I don't know much about it*, but if you *insist* upon it I guess we can trade."

And again he says (Rec. 94, middle of page) that on the next day:

"He came in in the morning and said to me: 'Well, Baker, if you *insist* upon something being done, and if *you* think it *best* for me, I will take $15,000.' I said: 'Mr. Cummings, I think that is *more* than I ought to pay, but you must decide whether it is best for you or not. I have no advice to give in this matter. This is a trade.'"

He also gives us, on page 97, near bottom, of his testimony, another version of this:

"I was out of the office when he returned them; when he came back I think I spoke to him first about it, and he said *he hardly knew* what to say. There was nothing definite accomplished that day. He asked my advice in regard to it, and I distinctly declined to advise him. I said, 'We are trading and you must act upon your own judgment.' On the next morning he came to the office and said he had been thinking it over and if I was a mind to give him $15,000 he would trade. I said that was *more than I could afford to pay*, but that to end the matter and have an end of the whole thing I would give it to him."

It is perfectly apparent, if this testimony of Baker's is truthful, that Cummings did not *desire* to sell his interest. It was only because Baker was *insisting* upon it; because, as Cummings says, of his "importunity" and for "peace and harmony" that he consented to part with it; for, says Baker, "I insisted upon his selling or dissolving partnership." It is also perfectly apparent from this testimony that Cummings had not learned the true aggregate of the cases from these documents, because we find him saying to Baker, "I don't know much about it." "Do you think it best for me?" His mind was in a state of uncertainty, and he appeals to his partner. If Cummings had ascertained from these papers and documents that *at that very moment* his share of the net fees amounted to $15,744, and that in a short time $36,000 more would be coming to him, can any reasoning man suppose that he would have asked whether it was best for him to make such a trade, and can it be reasonably said that if Baker had thought for one moment that Cummings knew the *actual truth*, he would have said to Cummings, "Fifteen thousand dollars is *more* than I can *afford* to pay," for Cummings could well have replied, "Why, man, you owe me nearly $16,000 now—at this very moment. Do you suppose I am going to make you a present of that, and, besides, throw into your lap as a further *gift*

$36,000 of fees, which will in a short time be due to me? Do you think I am an idiot?" And yet Cummings did this very thing when he made the "trade." What audacity of assertion to say that he made it knowingly!

It is impossible in this brief to show the Court by a criticism of the papers and documents handed Cummings by Baker before the consummation of the sale, that no intelligible idea can be gathered from them of the value of the inspector cases. This can only be ascertained by examining the papers themselves. We may say, however, here that we have Baker's admission that no correct computation could be made from them *alone*. It is true he stated elsewhere in his direct examination that it was a matter of easy computation; but we appeal from Baker, in the hands of his counsel to Baker under cross-examination. Among the papers handed Cummings was Exhibit H. M. B., No. 7 (Rec. 184), the large schedule, from which Cummings with the assistance of the other documents was expected to figure out the amount in value of the inspector cases. Now here (Rec. 126) is what Baker says of it:

Q. In reference to that document marked H. M. B., No. 7, is this one of the papers that you handed to Mr. Cummings to advise him of the condition of the business?

A. Yes; but I think possibly these blank sheets have been put on this as a kind of cover to this paper.

Q. What does that paper show?

A. This paper shows the name of the client, and, in general, the period for which arrears of salary were claimed for the client. For instance, here is the first name, Harry J. Ashmore, Burlington, N. J., from August 1, 1875, to November 30, 1875. Burlington, N. J., represented his place of service, and the dates represented the period of the service for which the claim was made.

Q. *Does that show how much was due to him?*

A. *No; this does not.* His salary, ordinarily, was taken from the Treasury registers, and the difference between that salary and the legal salary, as specified in the statutes, would be the amount due.

Q. Then in order to make this paper of any assistance to Mr. Cummings it would be necessary for him to search the Treasury records?

A. No, sir; I said the Treasury registers.

Q. That is the record, is it not?

A. It is a public document, the same as a blue book.

Q. You may change it to Treasury register and then answer the question?

A. It was one of the LINKS *necessary to complete the computation.*

Q. Had you in your possession anything that supplied that *link?*

A. *I had not,* unless a case had been adjudicated, as shown in document 70 and 225.

So that this intricate computation which on his direct examination he repeatedly states was "very easy to be done," was after all impossible without "the *link* necessary to complete it," and this link he admits he did not have, except partially, and therefore could not have given it to Cummings.

But Baker *did* have at this time a document in his possession which would have shown at once, by the simple addition of six columns of figures, that the fees already allowed and in process of collection were $32,977.51. This paper is a schedule marked H. M. B., No. 3. It was prepared, says Baker, "prior to any date there is on it." (Rec. 121, bottom of page.) The earliest date on it is August 30, 1886; it was in Baker's possession and *after* the assignment was made, not that Cummings might examine it, but with the request that Cummings (as he, Baker, was going out of town for some time) would mark off the remaining accounts as they were paid, and he says:

"If I had told him [Cummings] there were only $20,000 in fees in these cases, all that he would have had to do to have proved that I had misstated the case would be to have added up six columns of figures of letter page size, as shown in the exhibits." (Rec. 94.)

And on page 127 of the record he admits that the fees shown

by this paper to have been earned prior to September 6, were $32,977.51. Here, then, was a schedule in Baker's possession, at the very time that Cummings was struggling over a mass of papers and documents, which would have shown him in twenty minutes the exact truth as to the allowed fees. Baker admits that he did not give Cummings this paper until *after* the trade was made. Why did he not do it? Why not (if he desired him to obtain the information he was seeking) have placed in his hands this schedule and have said to him: "Cummings, add up these six columns of figures and they will show you exactly what you want to know. They will show you that our share of allowed fees to-day amount to nearly $33,000, and I have already received over $26,000 of it, and the drafts for the rest of it are now in the Treasury ready for delivery whenever I choose to call for them." Oh no! to have shown Cummings this schedule would have spoiled the *trade* in which "each party was to look out for himself." In his own language "it would have proved that he had misstated the case." Consequently it was sedulously withheld. Baker is cross-examined about this paper. (Rec. 120.)

Q. In other words, does not this paper, H. M. B., No. 3, about which I am now questioning you, contain *all* the cases of Cummings and Baker that are mingled with all other cases in these public documents?

A. That paper is supposed to contain them.

Q. Will you state whether it does or not?

A. So far as I know it does *accurately*.

Q. Then if this paper had been handed to Mr. Cummings, there would have been no need of checking off anything in in the other book, would there?

A. Not except by way of comparison.

Q. He could have gotten no further information from the Congressional documents in respect of the matters that you were negotiating for than is contained in this paper?

A. I presume not.

Q. Why then did you not hand him this paper?

A. *Because I* THINK *it was not in existence at that time.*

Q. When was it prepared?

A. *It was prepared just about the time the drafts began to be issued.* It was after the appropriation was made which was directed by documents numbered 70 and 225.

So, then, this is his excuse ("that it was not in existence at that time") for not giving this complete and accurate schedule to Cummings instead of placing in his hands a mass of confused and intricate documents. Let us see whether this excuse is founded in fact? As we have seen he admits that it was prepared prior to any date upon it, which is August 30, six days before the assignment. The other documents he had placed in his hands some "two or three weeks" prior to the assignment (Rec. 93, tenth line from bottom). "It was prepared just about the time the drafts began to be issued" *supra*. Well, the drafts began to be issued August 23, upon warrants dated August 19 and 20, and upon the certificate of the Commissioner of Customs dated August 13–14, so that carries us back still further. The strong probability is that it was prepared soon after the appropriation bill had passed the House, which was some time in June. Cummings says that was the custom, and Baker does not deny it. But, be that as it may, it is demonstrated by Baker's own testimony that it was in existence for at least three weeks before September 6, the date of the assignment: and yet during all that three weeks in which Cummings was asked to struggle and sweat over this worse than Chinese puzzle of partial schedules, contracts, documents, &c., from which Baker admits that Cummings told him he could not get much information, and which he, also, admits lacked "the *link* necessary to complete the computation," he, Baker at that very time, had in his possession, a paper which he himself calls a "complete and accurate" schedule. This paper, he tells us, would have corrected any misstatement of his and have solved the difficulty in as much time as it would take to add up "six columns of figures," say twenty or thirty minutes. Was ever a purpose to wilfully suppress the truth as to the *real amount* of these fees more completely exposed?

How did Baker prepare this schedule, H. M. B., No. 3? Is it not reasonable to suppose that he must have gotten some of the data for it from the very documents and papers handed Cummings? If he did, and who can doubt it, then he must have prepared it before he gave those documents to Cummings, because Cummings kept them from the time they were given him up to a day or two before September 6, and it is admitted that this schedule was prepared about August 20—"the time the drafts began to be issued." Here then is another demonstration of the falsity of the statement that "it was not in existence" when the documents were handed Cummings. We ask the Court to read the cross-examination of Mr. Baker upon the subject of this schedule, commencing at page 120 of the record with the question "I hand you now a paper marked Exhibit H. M. B., No. 3," etc. It is too long to insert here, but it so thoroughly exposes the want of candor on the part of the defendant that we would neglect our duty did we not request its careful perusal by the Court.

Has not the plaintiff proved out of the mouth of the defendant himself the truth of his story, viz: That Baker misinformed and misled him as to the amount of the inspector cases? Can any one doubt now the truth of what Cummings says in his testimony?

"When he gave me the papers to examine, I found that it was totally impossible to find or to make an estimate of the amount due or the value of those cases without examining every one of the thousand claims; and in that case I knew nothing about any of them, and I would have been obliged to consult Mr. Baker about every individual claim; so, after looking over the papers and seeing the utter uselessness of my attempting to make such computation, I gave them back again and told him that I should have to rely upon his judgment." (Rec. 22.)

And, again, on page 44 et seq. of his cross-examination:

Q. Mr. Cummings, did you get all the books and papers connected with the inspector cases, which were delivered to you,

as stated in the answer of the defendant, on pages 16 and 17 of the printed record.

A. I did not receive all the books and papers mentioned by the defendant in the answer to the bill. Some time in August, 1886, Mr. Baker gave me three large scrap books, containing in the vicinity of one thousand contracts. He gave me a number of Treasury registers; he gave me a list of cases that had been filed in the Department, but which were either tied up or disallowed, and which he called "doubtful;" he gave me a list of cases in which the fees were of other amounts than the regular amount of twenty-five per cent.; he gave me a list of cases also of those persons who had claims, but which he had been unsuccessful in getting, but I never saw any list of cases that were filed, and was not in the Department at that time; those papers I took home. The second morning after receiving the papers Mr. Baker asked me if I had come to any conclusion. I told him that I had not and I did not see as I could, because there was nothing in the papers to show whether the claims of this person or that person consisted of an amount of $1 or $1,000, and each case involved a calculation and an inquiry from him, and an examination of every claim covered by the whole thousand powers of attorney. Many of the cases had one allowance, some had two, and there was nothing to show in the papers what the case amounted to, generally, in the whole, or individually. I kept the papers about a week, when I returned them to the office and told Mr. Baker that I could not make any calculation upon them without we sat down and went through each case, but that he (Mr. Baker) knew how the cases stood, and that he could give me an approximate amount of what cases were filed and the probable amount of the allowance hereafter, and it was upon his own statement to me then, viz., that there was probably $75,000 and, possibly, $80,000 more claims that I acted.

Q. What books and papers mentioned in the pages 16 and 17 of the printed record that you didn't get?

A. I never received any list of cases then pending in the Treasury Department, except the list of cases that he called "hung up cases" or "doubtful cases" or "suspended cases."

Q. Will you name all the books and papers that you didn't get?

A. Well, I could not name all the papers that I didn't get, because that would include a great many. I have named all the papers that I did get.

Q. Now, what papers were there that you didn't get that would enable you to go over satisfactorily to show what was the amount of these claims?

A. I could not state, because I do not know whether there were any papers or not that would enable me to form an adequate idea of the amount of these claims.

Q. Are you able to say that Mr. Baker didn't give you all of the papers in those inspector cases?

A. I cannot say, because I do not know what list he had; I have stated all that he gave me.

Q. Were there any other papers necessary in those cases to enable you to reach a conclusion as to the results and the amounts of those cases?

A. There were no papers given me that would enable me to reach any conclusion, except as I have stated, to take each case and the whole mass of contracts individually and go through it and make a calculation; find out from Mr. Baker what had been allowed and to ask him individually in regard to each case.

Q. Then as I understand you, Mr. Cummings, none of the papers or books handed you by Mr. Baker would give you any information at all as to the character and position and result of those cases?

A. There was no doubt as to the results of the cases if the facts and the amounts could be arrived at by the individual calculation in each case, and I had nothing to show whether there had been any previous allowances, whether there was anything in the case why they should not receive the whole per diem as provided by statute.

Cummings also says, as we have seen, that he made the assignment and accepted $15,000 for his interest in these cases on the statement of Baker, that the fees in the adjudicated cases amounted to $20,000 or $22,000, and that the cases unappropriated for amounted to about $75,000 or $80,000, in which the fees would have been about $18,000 or $20,000. That, figuring on this basis, his share of the fees would have been about $20,000, and that he was willing to "knock off" $5,000 and accept from Baker in cash $15,000, thus making Baker's share $25,000 and his $15,000. This would have been a reasonably fair trade, and we submit that every fact in the case, and all the probabilities of the case, to say nothing of the demonstrated want of credibility on the part of the defendant establish the truth of Cummings' assertion. Let us not forget that this is the

only material fact in the case about which there is any substantial disagreement between Cummings and Baker, but though material it is not absolutely necessary to be established in order to entitle the plaintiff to a cancellation of this assignment. The defendant says that he made no statement whatever as to the aggregate of the cases, and that Cummings never asked him to so state. Incredible as this would seem let us, for the argument's sake, take him at his word; then, at least, the following facts are established out of Baker's own mouth.

Facts Established by Baker's Testimony.

First. That Baker had practically the entire charge of these inspector cases, and had had charge of them for years, during which time he had made himself thoroughly familar with them from every point of view, especially as to their amount and the settled law governing them.

Second. That Cummings knew very little about them having had very little to do with their prosecution.

Third. That Mr. Baker, to use his own words, was tired of doing all the work in these cases and dividing the pay with Cummings, although under the partnership division of the work it was his duty so to do.

Fourth. That Baker insisted upon Cummings, who was opposed to doing so, selling out to him, or to put it in his own words, " should either sell out or dissolve partnership."

Fifth. That Cummings, yielding at last to Baker's persistence and importunity, agreed to consider the matter of selling out, and to reach a basis for valuing his interest in the cases, asked Baker for information, which Baker answered by handing him a confused mass of papers and documents from which he, Baker, admits no calculation could be made without supplying other " links " which were not supplied.

Sixth. That at the time of handing him these papers and documents, he had in his possession, but kept from Cummings,

a schedule (H. M. B., No. 3) which contained a complete and accurate list of the cases then appropriated for, which list showed that there was then due Cummings $15,744 as his share of the fees up to that time.

Seventh. That Cummings offered to divide the fees on a certain basis or take $15,000 just as he, Baker, thought was best for him, Cummings.

Eighth. That Baker refused to advise Cummings, but told him that to end the matter he would give him $15,000, although that was "*more* than he could afford to pay," viz., more than it was worth.

Ninth. That when Cummings accepted $15,000 for his interest in the inspector cases on Baker's statement that it was more than that interest was worth there had already been allowed cases in which the *net* fees amounted to $31,488.70 of which Cummings' share was $15,744.35, and that upwards of $26,000 of this money was already in Baker's pocket and drafts issued and *ready to be delivered to him* for the remainder.

Tenth. That Baker, moreover, had, at that very time, on file in the department applications for allowances amounting to $226,916.47 and ready for filing applications which increased this amount to $275,099.58, the fees due on this amount being $71,743.50. See Auditor's report (Rec., 226).

Eleventh. That out of these cases, if there had been no "trade," Cummings would have received over $51,000, whereas, by means of this assignment, Baker pocketed nearly $83,000 in net fees, while Cummings received but $15,000. See Auditor's report from Baker's own account as filed.

Twelfth. That during the entire negotiation Baker, to use his own words, dealt with Cummings on the theory that "each man should look out for himself, just as in any other trade."

Considering the enormous disparity between what was paid for this interest and what it was really worth, considering how much Baker made and how much Cummings lost by reason of this assignment of his interest, will not a court of conscience find ample ground for setting aside the sale in the single fact

that the selling partner was in a very much inferior position in regard to knowledge of the value of the interest being sold than the purchasing partner? But if more than this be needed, will not a court of conscience, when the partner with full knowledge says to the partner with inadequate knowledge, who relies, and who has a right to shut his eyes and rely, on the latter's statements as a guide for his action, "I am paying more than I can afford to pay," find in such a false and *misleading* statement, whether made knowingly or not, an abundantly sufficient reason for setting aside a contract made upon such an inadequate consideration? It is too well settled for doubt that a contract between two men under such relations of confidence and trust as exists between two partners, one having knowledge of the facts and the other in ignorance of them, must be fair to the last element in it; must be tested by the "highest standard of honor"; the slightest taint, the merest suspicion of fraud, *when accompanied with gross inadequacy of consideration*, will condemn it to destruction.

"When the perpetrator of the fraud is the managing partner with the peculiarly intimate knowledge of the firm's affairs incident to that position, and the smaller opportunity for investigation on the part of the other partner, and with the degree of confidence reposed in a manager, a settlement induced by him, or a sale to him induced by fraud, *will be reopened more readily and more latitude will be allowed* than in other cases, *and want of vigilance on the part of the selling partner will be no defense.* Bates on Part., §961.

Nay, more than this: Mr. Justice Miller, in Brooks *vs.* Martin, 2 Wallace, 70, has laid down the condition—the sine qua non—which governs in cases where the proposition of purchase proceeds from the managing partner to a partner in ignorance of the actual status or not having the full knowledge possessed by the former. In such cases, he says:

"We lay down, then, as applicable to the case before us, and to all others of like character, that in order to maintain such a sale it must be made to appear, first, that the price paid ap-

proximates *reasonably* near to a fair and adequate consideration for the thing purchased; and, second, that *all* the information in possession of the purchaser, which was necessary to enable the seller to form a sound judgment of the value of what he sold, should have been communicated by the former to the latter."

In the case at bar neither of these important requisites is to be found.

First. The price paid does *not* approximate reasonably near to a fair and adequate consideration for the thing purchased. Secondly, *All* the information in possession of the purchaser which was necessary to enable Cummings to form a *sound* judgment of the value of what he sold was *not* communicated to him by Baker.

Such is the case we have brought into this court. If it is not such a case, then no sale by one partner of his interest to his co-partner was ever justly set aside. The defendant's own statement, "I traded with him just as I would in any other trade, in which I considered that each party was to look out for his own interest," is enough to vitiate the transaction, for it is unnecessary to say that he could not deal with his co-partner with such a rule to guide his conduct. The confidential relation is at once destroyed. He trades as a horse jockey, not as a partner, and he cannot retain the fruits of such a trade when the disparity is as fifteen to eighty-five, for, as we have seen, out of the more than one hundred thousand dollars in fees collected on these cases, Cummings received but $15,000 and Baker at least $85,000; indeed, a close estimate makes Baker's share about $89,000.

The Leading Cases upon this Subject Contrasted with the Case at Bar.

Having examined the merits of the case, let us now make a comparison between it and the two leading cases on the subject, that of Maddeford *vs.* Austwick, the English case, 1

Simons, 89, and Brooks *vs.* Martin, the American case, 2 Wallace, 70.

In the case at bar, Baker, as we have seen, gave to Cummings a confused mass of papers and documents from which to form an estimate of the value of the interest he was asked to sell. We have seen that to obtain any information from them was an intricate and difficult matter, to say the least of it. We have seen that Cummings said of them:

"When he gave me the papers to examine I found that it was totally impossible to make an estimate of the amount due," &c.

We have seen that Baker at the time Cummings was examining these papers, and after Cummings had told him "he did not know much about it," "that he hardly knew what to do," &c., had in his possession a "complete and accurate" scheduie of the cases already allowed and appropriated for which showed at almost a glance that the amount offered Cummings for his interest was $744 35 less than he was at that moment entitled to receive of those cases alone, to say nothing of the cases not yet appropriated for; and we have seen that this "complete and accurate" schedule he kept back from Cummings until after he had induced him by great persistency, and, as he, Baker, says, by a threat of dissolution of the partnership, to part with his interest.

Now, let us see how this state of facts compares with Maddeford *vs.* Austwick. Said the court in that case:

The plaintiff seeks to avoid the agreement of 1817 upon the ground of fraudulent misrepresentations by the defendant [just as Cummings on the same ground seeks to avoid the agreement of Sept. 6, 1886]; but there is no *direct* proof of any misrepresentations [but there *is* in the case at bar, for Cummings testifies most positively to it. Maddeford was incompetent to testify at that time on the ground of interest.] It is however to be *inferred* that the defendant Austwick must have stated to the

plaintiff that the terms proposed by him were for a fair consideration. [We have Baker's own admission that he told Cummings that he was paying more than he could afford to pay.] That the proposal for such an agreement originated with the defendant Austwick, is proved by his letter of the 11th of February, 1817. [Baker admits that the offer originated with him and was persistently insisted upon.] That the public books of account belonging to the concern to which all parties had access, were of an *intricate* nature, and required considerable experience and attention to understand and make them out is proved by the bookkeeper, Chase. [Here we have the mass of papers, books and documents, the "intricacy" of which is practically admitted by Baker and positively testified to by Cummings.] That the plaintiff is not conversant with accounts is proved by the same Mr. Chase and also by Mr. Wright. [Cummings knew very little about these cases and could ascertain nothing from these books, papers and documents without the aid of the "link" which was not supplied him as Baker admits.] The particular nature of all these public books has not been explained to the Court, but it is clear they did not contain any statement of an account between the plaintiff and defendant. [It is conceded there was no such statement among the papers handed Cummings.] At the time the agreement was entered into between the plaintiff and the defendant, the defendant had in his possession a private book which did contain a statement of the accounts between the plaintiff and the defendant made out by the defendant. [Baker had the "complete and accurate" schedule, H. M. B., No. 3, made out by him], whereby it appeared that the 1,000 pounds which the defendant agreed to pay to rhe plaintiff in addition to the moneys which he had drawn from the concern would have been nearly but not quite a fair consideration if no profits had been made from the concern of the mint; but that taking the mint profits into the account, which the defendant was unquestionably bound to

divide with the plaintiff, it would be many hundred pounds less than the plaintiff would be entitled to receive. [The schedule, H. M. B., No. 3, showed "by the simple addition of six columns of figures" that Cummings' share of the fees in cases for which drafts had been already issued exceeded by $744.35 what Baker gave for the entire interest, present and future.] The defendant being the partner whose duty it was to keep the accounts of the concern [Baker had charge, as he admits, of the inspector cases] could not, in fairness, deal with the plaintiff for his share of the profits of the concern without putting him into possession of *all* the information which he himself had with respect to the state of the accounts between them. [Baker admits that he did nothing more than give the papers and documents to Cummings, that he never told him what the fees aggregated, that he "distinctly declined to advise him," except to say that "he was paying him more than he could afford to pay."] The defendant knew from the accounts in his possession that the 1,000 pounds was not an adequate consideration for the plaintiff's share of the profits [just as Baker knew from the schedule in his possession that $15,000, or, as he originally offered, $14,000 was an inadequate consideration for Cummings' share of the business; in fact, less than Cummings was entitled to demand of him then and there had he refused to sell out], and he cannot be permitted in a court of equity to maintain an advantage which he has gained over the plaintiff's ignorance [and neither should Baker be permitted by this Court "to maintain an advantage which he has gained" over Cummings' ignorance in regard to the true amount of fees then due him and to become due him].

This case would seem on "all fours" with the case at bar, but it is not more so than the case of Brooks *vs.* Martin, 2 Wall., 70, the opinion in which was delivered by Mr. Justice Miller.

Brooks and Martin were partners who, in June, 1847, had entered into an agreement to buy up the claims of soldiers,

then returning from the Mexican war, to bounty land warrants and scrip before they had been issued by the Government. Of this business the Court said: "We have little doubt that the traffic was illegal." Martin furnished the money and Brooks attended to and had sole charge of the business. Martin lived in New Orleans and Brooks conducted the business partly in Washington and partly in Wisconsin, where the lands were to be located with the scrip. There was a third partner—a Mr. Field—who, however, cut but little figure in the case. We quote from the report of the case:

"In June, 1848, Martin, at the invitation of Brooks, went to Pittsburgh, in Pennsylvania, to meet Brooks, who then and there, on the 29th of June, 1848, bought out his interest in the partnership. Martin at the time had never been in the West and in fact knew little or nothing as to the particulars of what had been done there. There was no evidence, indeed, except the answer of the defendant, which was discredited by the facts, that Martin ever had a remote conception of the condition of the business."

On the other hand, that Brooks "knew the real condition of the concern, and was fully and minutely informed as to every item of its business" was considered by the Court as "beyond dispute." At the time of the "trade" between Martin and Brooks there was to the credit of the concern in "clear cash profits" $15,000 and lands located which the Court estimated as worth about $57,000, a total of $72,000, of which Martin's share, for the partnership by its terms was not an equal one, came to $30,000. The consideration of Brooks' purchase was an *agreement* by him "to pay all the debts of the partnership, about $45,000, and a payment as he alleged, of $3,000 to Martin, though as Martin asserted a payment of about one-half a balance due him on another account, which balance it was evident that Brooks was bound for, Brooks gave no security for the performance of his agreement to pay these debts."

Martin on the 3d of August, 1857, that is to say, a few days

more than *nine* years after the sale, filed his bill—(in the case at bar the bill was filed in a little less than *three* years and four months afterwards). The bill asked that the contract of sale be set aside, and for an account and division of the profits, on the ground of plaintiff's own alleged embarrassed condition at the time of the sale. [Cummings says (p. 21) and Baker does not contradict him: "Mr, Baker knew that I at that time, was in need of considerable money, as I was carrying on some pretty extensive building operations for myself"] his ignorance of the partnership business, fraud on the part of the defendant, Brooks; concealment by Brooks of what he knew; misrepresentation in what he professed to tell, and want of consideration proportioned to the real value of the interest which the complainant had in the concern. The answer admitted the purchase by Brooks, but denied fraud. The court below gave the relief prayed and there was an appeal to the Supreme Court.

The foregoing is a statement of a case which the reporter occupies about four pages in narrating.

After disposing of a preliminary point having no application here, the court said:

"If the parties are to be regarded in this transaction as holding to each no different relations from those *ordinarily* attending buyer and seller; and as, therefore, under no *special* obligation to deal conscientiously by each other, we are satisfied *that no such fraud is proven as would justify a court in setting aside an executed contract.* But there are relations of trust and confidence which any man may occupy towards another, either personally or in regard to the particular property which is the subject of the contract, *which impose upon him a special and peculiar obligation* to deal with the other person towards whom he stands so related *with a candor, a fairness and a refusal to avail himself of any advantage of superior information or other favorable circumstance* not required by courts of justice in the usual business transactions of life. It is contended that the relation of Brooks towards Martin was of this character; and before we can dispose of the question of fraud, it is necessary to determine whether the claim thus set up is well founded; and if it is, what are the principles upon which courts of equity

determine the validity of contracts between parties so situated. It is argued that the partnership existing between the parties constitutes of itself a relation which calls for the application of the principles which we have alluded to; and Judge Story, in recapitulating the confidential relations to which they are appropriate, mentions partner and partner as one of them. It is not necessary to decide here whether, in all cases, a sale by one partner to another of his interest in the partnership concern will be scrutinized with the same closeness which is applied to fiduciary relations generally; for there are special circumstances in this case which bring it clearly within the rules applicable to that class of cases.

"The defendant was not only the partner of plaintiff, but he was his special agent in the management of the business. The bill alleges that he had a power of attorney from plaintiff, authorizing him to represent, on all occasions, the interest of the plaintiff in the conduct of the affairs of the firm, and although this is denied in the answer, *and is not proven*, the answer *does* state that at the time the partnership was formed it was distinctly agreed between plaintiff and defendant that the latter was to have full and exclusive control of the business; and should so far represent the plaintiff as to give defendant a preponderating influence in the management of the partnership over Mr. Field, the third partner."

Just as it was practically agreed between Baker and Cummings, that Baker should manage the inspector cases, which were cases arising out of the revenue, while Cummings managed the war claims department. Then after considering the facts, among others, that Martin was two thousand miles away, and could therefore necessarily have known but little if anything of what was going on, just as in this case, Cummings by reason of the arrangement of the business between himself and Baker, knew little if anything of the inspector cases, and would hardly have known much less of their actual amount and condition had he been two thonsand, or ten thousand, miles away. Mr. Justice Miller proceeds:

"Under these circumstances Brooks must be held to have been not only the partner but the special agent of Martin, and the purchase made by him of Martin's interest must be tested

by the rules which govern such transactions as between principal and agent."

It will thus be seen that we have the authority of this Court for the undoubtedly sound doctrine that where in a partnership the business (and the same must necessarily be true as to a *branch* of the business) is conducted and managed by one of the partners, that partner is the *agent* of his co-partner for the conduct of the business, or of the *branch* of the business, which he is in charge of; and their relation is not only that of partner, but of principal and agent. Certainly so far as these inspector cases were concerned, Baker was not only the partner of Cummings but he was his agent to take care of his interest in those cases, just as Cummings was Baker's agent to take care of his interests in the war claims cases. And so proceeding with his opinion Judge Miller says:

"What are those rules," viz., which govern such a relation? "On the whole, the doctrine may be generally stated, that wherever a confidence is reposed, and one party has it in his power, in a secret manner, for his own advantage, to sacrifice those interests which he is bound to protect, he will not be permitted to hold any such advantage. 1 Story, Eq., § 323. Or, to speak more specifically, if a partner who exclusively superintends the business and accounts of the concern [as Baker did of the inspector cases] by concealment of the true state of the accounts and business, purchase the share of the other partner for an inadequate price, by means of such concealment, the purchase will be held void." Id., § 220.

Then, after citing from Lord Eldon to show that the Court will in such a case make "a jealous and scrupulous examination of all the circumstances," he formulates for the Court this rule:

"We lay down, then, as applicable to the case before us, and to all others of like character, that in order to sustain such a sale, *it must be made to appear*, first, that the price paid approximates reasonably near to a fair and adequate consideration for the thing purchased (and not as in the case at bar $15,000

for $50,000) and, second, that *all* the information in possession of the purchaser, which was necessary to enable the seller to form a sound judgment of the value of what he sold should have been communicated by the former to the latter."

By whom must it be *made* to appear? By the defendant, of course. The burden of proof is upon *him*, not on the plaintiff. All that is necessary for the plaintiff to do is to show that the price did not "approximate reasonably near to a fair and adequate consideration," and thereupon he establishes a case entitling him to have the sale rescinded *unless* the defendant show that all the information in his possession "which was necessary to enable the seller to form a sound judgment of the value of what he sold" had been communicated by him to the latter. Apply this rule to the case at bar, and what do we find? The plaintiff, it must be conceded, has established the inadequacy of the price. The burden of proof then is upon Baker to satisfy the Court that he communicated to Cummings all the information which he, Baker, had which was necessary to enable him, Cummings, to form a sound judgment of the value of what he sold. Has Baker done so? On the contrary, does he not practically admit that he did not give Cummings all the information in his possession? "He asked me for advice, but I distinctly refused to advise him." "He told me he did not know much about it," yet "I kept away from him the very paper (schedule H. M. B., No. 3) which would have immediately informed him." "I did not tell him that I had already collected over $26,000 in fees, half of which was his and that the remaining five or six thousand dollars were already in the shape of drafts and were only awaiting delivery. But I did tell him, although I had in my pocket more than $26,000 of the firm's money and knew that over $5,000 more was over in the Treasury Department ready for delivery, that $15,000 was more than I could afford to pay him, and I knew also when I said this that at that very time I myself had already filed or ready for filing in the departments over $226,000

in cases in which our fees would reach nearly $72,000. Yes, I knew all this, but I never told him the 'aggregate' of them, I merely handed him a confused mass of papers, contracts, documents and Treasury registers, which lacked the 'link necessary to complete the computation,' and keeping back from him the 'complete and accurate' list, told him to find out for himself; and when he came back and told me that he did not know much about it and asked my advice I refused to advise him or tell him the actual facts, because 'we were trading and each must look out for his own interest.'" Can it be doubted how Mr. Justice Miller and his associates who decided Brooks *vs.* Martin, would have decided this case? would decide such a case?

But this is not all of this case of Brooks *vs.* Martin, which needs but little more than a change of names to make it the case of Cummings *vs.* Baker. The Court continues:

"In regard to the adequacy of price, it is obvious that Brooks did not pay Martin anything that he was not bound to pay before the sale was made, or assume any obligation under which he did not already rest. Nor did Martin receive anything which Brooks did not then owe him, or his promise to do anything for which Brooks was not previously bound."

Did Baker pay Cummings anything "that he was not bound to pay before the sale was made." On the contrary, he paid him *less* by $744 than he would at that very moment have been bound to pay him if the sale had not been made. See Helmore *vs.* Smith, *supra.* What *consideration* was there to support this assignment? Was it not clearly (aside from all other questions in the case) the merest *nudum pactum?*

Other Authorities in Point.

A few more authorities in point may not be out of place.

"While it may be true that partners and agents may not be absolutely precluded from dealing with the firm and the principal, yet such dealing is not entirely at arm's length, as may be the case with contracts between strangers. On the contrary the

utmost fairness is required. There should be no *suppressio veri* or *suggestio falsi*. The confidential relations which exists between such parties demands entire good faith and perfect frankness, and when they are absent, the contract should not be upheld; *not so much on account of any actual fraud or injury which may have been committed, but because of opening the doors thereby and thereto.*" Whitman *vs.* Bowden, 27 Shand (So. Ca. 61, citing Pars. Part 223 et seq; Pom. Eq. Jur. 901 et seq. Story's Eq. Jur., 206 et seq.)

In Caldwell *vs.* Davis, 10 Col. 481, Caldwell and Davis were partners jointly interested in an option upon a mine which they were endeavoring to sell. Davis, without the knowledge of Caldwell, had found a probable purchaser in one Ohlwiler, and thereupon, without disclosing the fact to Caldwell, bought his interest in the option for $500, and a horse of the value of $100. Subsequently, July 13, 1880, Ohlwiler purchased the mine under an arrangement with Davis, that he and Ohlwiler should be interested in it, share and share alike. Caldwell filed his bill some *five or six years afterwards*, the exact date is not given, but as the decision was rendered in October term, 1887, it may be presumed that the bill was filed about the latter part of 1885, or early part of 1886. This was *after* the statutory period of limitations would have barred his claim had he known the facts. The Court said: "The question of laches by the plaintiff in bringing his suit was made an issue by the pleadings. * * * The question of laches must be determined upon the knowledge of the plaintiff and his diligence in obtaining knowledge upon which his right to relief rests. There were no such laches on his part as will defeat his right to relief."

Upon the merits of the case, we quote from the opinion of the Court:

"The first and most important question for consideration is that of the sufficiency of the evidence to entitle the appellant to the relief demanded. Appellant bases his right to relief upon the conduct of the appellee; and how far the conduct of the appellee affects such right *must be determined by the relation of*

the parties to each other. The plaintiff alleges that they were co-partners for the purpose of buying and selling an option on certain mining claims. Under the decision in Kayser *vs.* Mangham, 8 Colo., 232, the evidence in this case fully establishes the allegations. The relation existing between partners is one of trust and confidence. Pom. Eq., 963, partners when dealing with each other in relation to partnership matters, are required to make *full disclosure* of all material facts within their knowledge, in any way relating to the partnership affairs. A community of interest exists between the partners and a community of interest produces a community of duty. This community of interest by the terms of the bond and agreement, was to continue until the 22d day of July. The bond having been obtained for the purpose of selling the option so acquired at a profit, for the joint benefit of appellant and appellee, a joint duty and obligation rested upon each, during the full time the bond had to run, to work for the accomplishment of such purposes. We think the evidence clearly shows that appellee did not perform this duty; that prior to appellant's return from the East, appellee had negotiated a sale to Ohlwiler of one-half interest in the property for his own exclusive benefit; that he deliberately planned to obtain appellant's interest in the bond to enable him to carry out his negotiations with Ohlwiler; that he intentionally concealed from appellant all knowledge of his negotiations with Ohlwiler, and he led appellant to believe that he wanted appellant's interest in the bond for the sole purpose of enabling him to put up the money and take the property.

"In Story, Eq., § 329*a*, it is said: 'When the contract is between those who sustain, or have lately sustained, any intimate and confidential relation, the law presumes the existence of that superiority and influence on the one part, and that confidence and dependence on the other, which is the natural result of the relation, and will accordingly decree the cancellation of the contract, unless it appear affirmatively to have been equal and just.' In the making of this contract the parties were not on equal footing. Davis had knowledge of facts relating to the sale of the property which Caldwell did not have, and which knowledge equity and fair dealing required of him to disclose to Caldwell, because such knowledge was obtained under circumstances which made it the common property of himself and Caldwell. The concealment of, or the failure to disclose these facts to Caldwell made Davis guilty of an actual fraud. Pom., Eq. Jur., 901, Story, Eq. Jur., § 308. Dambman *vs.* Schutting, 75 N. Y., 55–61. The contract between Davis and Caldwell was unequal, in that it enabled Davis to obtain all the

benefits, under their joint undertaking, and unjust in that such benefits were so obtained by reason of the the suppression by Davis of facts which it was his duty to disclose.

"In Fitzsimmons *vs.* Joslin, 21 Vt., 129–138, Redfield, J., in commenting upon contracts of this nature, says: 'Can it be said, then, that when one party acts under a misconception of the facts most material to the contract, which are known to the other party and studiously kept back, knowing that the other side is acting under this dilusion, can it be said that such contract is binding at the bar of conscience, or, indeed, in morals?'"

In concluding these comments upon the sufficiency of the evidence, we submit that the Court in forming its judgment should be controlled by the following propositions of law, all of which, we contend, are fairly deducible from the authorities hereinbefore cited:

First. In a purchase by a managing partner, or a partner having more knowledge than the selling partner, of his co-partner's interest, if the price paid does not approximate reasonably near to the value of the thing sold, the burden of proof will be upon the purchaser to show that *all*—not a part—of the information possessed by the purchasing partner was communicated to the selling partner, which was necessary to enable him to form a *sound* judgment of the value of the interest he was selling. The selling partner must not wait to be asked; it is not sufficient that he say say, "There are the papers, examine them, and if there is anything about them you want to know, ask me and I will tell you." He must tell *without waiting to be asked.* He must not only not permit, but he must not, even, though it be without fraudulent intent, permit his partner to sell without having *all* the information that *he* has. It is not sufficient to say that "He did not sell in the dark." He must be able to say, "He sold with as much light on the subject as I had."

Second. The sale will be rescinded if the purchasing partner undertakes to impart such information, and in doing so misleads his partner by word or act, either directly or indirectly

said or done, though in the saying or doing of it he did not *intend* to mislead; it is the *consequence*, not the *intention*, which controls.

Third. In scrutinizing a sale to a partner by his co-partner, the question is not whether actual fraud was committed, but whether the price paid was *approximately adequate* to the value of the interest sold, and whether the selling partner possessed all the information necessary to form a *sound* judgment.

Fourth. In all such cases, viz., where the price paid is inadequate, the Court will search "with lantern in h[illegible]" for a reason to rescind the sale, and the slightest circumstance of unfairness will be sufficient for that purpose; nor will *want of vigilance* on the part of the seller in making the necessary investigation to inform himself of the true value of the thing he is selling *be a defense.* He has a right to rely on the statements of his better informed co-partner; and although he may at the time doubt their entire correctness, he has a right to banish his doubts and to act upon such statements, believing in the integrity of his co-partner until the contrary is forced upon him by subsequently developed facts.

Lastly. The sale must be tested by "The highest standard of honor." If the purchasing partner admits that he negotiated for and consummated the sale upon no higher standard than that which would have controlled him "in an ordinary trade, in which each party looks out for his own interest," he cannot, upon his own admission, maintain the sale.

Alleged Laches.

The only remaining question to be discussed is the effect upon complainant's right to relief of his alleged laches.

We have already seen from the opinion of Chief Justice Alvey (Rec. 219) that the assignment in this case being void from the beginning, the partnership business is to be regarded as continuing with the same effect as if the assignment

had never been made, until the final dissolution in September, 1889. As the bill was filed within a few months of their dissolution (February 1st, 1890), the doctrine of laches has no application for the statute of limitations would only run from the date of the dissolution. To that effect are all the authorities:

"Upon the principle that laches or lapse of time which will bar relief in equity will be measured by the analogies under the statute in similar cases at law, the courts have generally held that the time prescribed in the statute of limitations for an action of account at law will bar the right to an accounting in equity. But even should we consider the date from which we are to be charged as that of the assignment, viz., September 6, 1886, yet the statute of limitations would have no application. *As no right to demand an account exists until dissolution, the statute has been held to begin to run from that time.*" Am. Cyl. tit., Partnership 1282, And in support of this proposition are cited:

Haynes *vs.* Short, 88 Ala., 562.
Horne *vs.* Ingraham, 125 Ill., 198.
Pierce *vs.* McLellan, 93 Ill., 245.
McKaig *vs.* Hebt, 42 Md., 227.
McKelvey's Appeal, 72 Pa. St., 409.
Allen *vs.* Woonsocket Co., 11 R. I., 288.
Hewit *vs.* Lewis, 4 Mackey, 10.

"So long," says Lindley, "as a partnership is existing, and each partner is exercising his rights, and enjoying his own property, the statute, it is conceived, has no application at all, but as soon as a partnership is dissolved, or there is any exclusion of one partner by the other, * * * the statute begins to run." 2 Lindley on Partn., 1024.

But leaving out of the case entirely the contention that the assignment is void *ab initio* and that, therefore, limitations would run only from the dissolution of the partnership we still have the case of an assignment alleged to have been obtained by fraud only recently discovered. To such a case whether *laches* are to be imputed depend upon the circumstances of the case. What will constitute laches in one case will not in another. Each case, say the books, must rest on its own peculiar circumstances.

We have therefore to consider the circumstances of the case at bar. The bill was filed three years and four months, lacking a few days, after the assignment of the 6th of September, 1886. The defendant relies upon the failure of the plaintiff to file his bill four months sooner than he did.

In the case of Brooks *vs.* Martin, heretofore referred to, the Court found that a delay of a little over *nine years* was not too long a time. It was "apparently so soon as Martin had examined into the facts of the case." And in Chouteau *vs.* Barlow, 110 U. S. 238, a firm formed in 1842, dissolved in 1852, and a bill for an accounting filed in 1876, was held under the circumstances not to be barred by laches.

So, in Kilbourn *vs.* Sunderland, 130 U. S. 505, a partnership case which went up from this Court, the bill was filed June 9, 1881, *nine* years after the event happened, in respect of which an account was asked. The Court, Fuller, J., said:

"In answer to the defense of laches and limitations, the complainants contend that the alleged bad faith of defendants was not discovered by them until a short time before the bill was filed, and that they had no intelligible information of the excess in charges for care and management until late in June, 1878. Reasonable diligence is, of course, essential to invoking the activity of the Court, but what constitutes such diligence depends upon the facts of the particular cases. Where a party by fraud is in ignorance of its existence, the duty to commence proceedings arises only upon discovery, and mere submission to an injury after the inflicting it is completed, cannot generally, and in the absence of other circumstances, take away a right of action unless such acquiescence continues for the period limited by the statute for the enforcement of such right. De Bussche *vs.* Alt, 8 Ch. D., 286, 314. We hold that the complainants moved with sufficient promptness upon discovering the fraud, *and that although, reposing confidence in their agents, they may have neglected availing themselves of some source of knowledge they might have sought, the defendants cannot be allowed to say that complainants ought to have suspected them, and are chargeable by what they might have found out upon inquiry aroused by such suspicion.*"

Indeed it must be a most remarkable and inexcusable case of laches, and dependent upon very peculiar circumstances, where a court will declare that a delay of less than four months after the statutory period of limitations will bar relief against an inequitable contract between a managing partner and his co-partner, when the latter's ignorance has been imposed upon. But there have been no laches of any sort in the case at bar, the bill was filed within ample time after the plaintiff had, as in Brooks *vs.* Martin, "examined into the facts of the case."

Counsel for defendant claims that Mr. Cummings, if he had been cheated, could have discovered the fact almost immediately afterwards by an examination of the schedule Exhibit H. M. B., No. 3, containing the list of adjudicated cases, which It will be remembered, was placed in his hands by Baker the day after the sale. Cummings says of this, that pending the assignment:

"I asked Mr. Baker how many fees there were that were due us in cases that had been adjudicated, and for which appropriation had been made, and which were then in the process of collection, and he said about $20,000, or not more than $22,000. I was somewhat surprised at that, and I so expressed my surprise to him; he said that our fees in some of those cases were not so much as usual; some only about 10, 15, or 20 per cent. But I will say here that I had never seen the list of cases (Ex. H. M. B., No. 3) with the amount of fees that had been adjudicated in 1886, for which an appropriation had been made by Congress and rulings had been made in the Treasury until *after* I had made an assignment to him. I simply took his word for it." (Rec. 21, near bottom of page.)

Then on page 23 he says:

"The amount of claims that had been adjudicated and which were in process of collection I discovered of course within a day or two after Mr. Baker had delivered me the schedules and I continued the collections, because these schedules contained the name, the amount, the fee and all the data pertaining to each case, and it was hard for me to reconcile the amount of fees that he said and the amount of fees that were on the

schedule; and I know often we had to pay out a large amount of our fees to other attorneys, as I frequently had paid one-half of a fee to a local attorney to work up the evidence; and I had supposed the great diminution of these fees from what I supposed, viz., $32,000, in the vicinity of $30,000, was owing to the division with other lawyers."

That it was this statement of Baker's which misled Cummings at first, viz., that although there were apparently more than $20,000 or $22,000 in fees in the adjudicated cases, yet as a great deal had to be paid to other attorneys, there was really not more than that amount, is plain from his letter to Baker, written on the 23d of August, 1889, when his suspicions had become aroused by the subsequently large appropriations. In his letter he says:

"This whole difference between us can be settled in a moment if you will only show me the list of cases and of fees that were received in 1886; you say that there was only $20,000 to $22,000 of fees; I say that there were from $32,000 to $34,000 of fees. What did you do with the other $12,000 or $14,000? *Did you pay it out to any person?* I don't care to whom, or for what did you pay it; *did you pay it out* to any person, I don't care to whom or for what did you pay it, *did you pay it out?* and will you give me your word that you did pay them out?" "I received a letter from him dated August 24th," "It is none of your business; I bought you out of these claims, horse, foot, dragoons and all." (Rec. 25, near bottom of page.)

How it begun to dawn upon Cummings that he had been overreached is explained best in his own words:

"Mr. Baker when I made the assignment said that there were $75,000 or $80,000 of cases, unadjudicated. Under Congress of 1886-'87, Mr. Baker had had allowed about $75,000, or in that vicinity, of inspector cases and which went to Congress for appropriation; that Congress made no appropriation for the the deficiency bill and it failed. I thought then Mr. Baker was pretty near correct in his estimate $75,000 to $80,000, that was what he told me there was of additional cases and that is the amount that was sent up for appropriation, I, supposing that that was all the cases there were, and he had no further cases

adjudicated that I knew of in the year 1887; in the winter of 1887-'88, Congress made an appropriation to cover the $75.000 or $80,000 of cases that had been sent up to the previous Congress and which remained unappropriated for; when they were allowed, I helped Mr. Baker, aided him as much as usual, in fact I gave him as much aid, or perhaps more, in collecting this lot of cases in January or February, 1888, as I ever had in collecting any of the others. To my astonishment, late in the Spring of 1888, Mr. Baker had another lot of cases sent up amounting to about $70,000 or $75,000 worth of cases. Then I began to think could it be that Mr. Baker could have been so mistaken as to get out only one-half of the cases. Along in August, to my astonishment, there was another lot of about $60,000 or $70.000 worth of cases allowed, making something over $200,000 worth of cases while I had supposed there was $80,000." * * * "It was when I saw, in 1888, this large amount of cases allowed, where I had supposed there were only $80,000, according to Mr. Baker's statement, *that it set me to thinking*. I then began to investigate the question of the fees of 1886, the first lot of cases.*

Q. That is that lot of cases in which he stated that the fees were from $20,000 to $22,000?

A. Yes, and I was convinced that the fees that were due and had been earned and paid in September and October, 1886, instead of being $20,000 or $22,000, were really from $32,000 to $34,000, one-half of which were mine at the time when I made the assignment." (Rec. 24.)

Again, on page 26:

Q. Now it is alleged in the answer of Mr. Baker—Mr. Baker

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*The first appropriation made by Congress after September 6, 1886, the date of the assignment, was that of February 1, 1888. The following table shows the date and amount of each appropriation referred to by Cummings in his testimony, and also the volume and page of the Statutes at Large where they will be found:

February 1, 1888, 25 Sts. L., p. 28		$ 73,226.76
March 3, 1888, 25 Sts. L., pp. 65 and 70	$62,661.37, $46,024.09,	$108,685.46
October 19, 1888, 25 Sts. L., p. 598,		$110,636.64
Total		$292,548.86

Nearly all of these were allowances made by the Treasury Department on cases *filed* by Baker, and ready for settlement *before* September 6, 1886. The above list does not, of course, include the appropriation made in July, 1886, of about $134,000, nearly every dollar of which had been collected by Baker at the time of the assignment, and which has been so often referred to in the testimony and this brief.

states in his answer, that having full knowledge of all the facts necessary to "attack said sale as void, you allowed three years or more to elapse without making complaint." You may state why you made no complaint sooner than that?

A. It was impossible to tell whether I had been deceived or not in regard to the number of claims until the claims had been allowed and paid; there was no payment of claims *for one year and four months* after the date of the assignment, and it was not *until the summer or spring of 1888* that I was aware or could be aware that any more than $75,000 or $80,000 of claims were still to be prosecuted; and it was not *until the fall of 1888* that I knew that the amount of claims was so much in excess of what Mr. Baker told me.

Time and again the defendant's counsel returns to the attack with the purpose of showing that the plaintiff should have known all these facts when he made the assignment. It would take up too much space to quote from it here, but the court will find in the cross-examination of the plaintiff in rebuttal, some of these efforts of defendant's counsel in that direction. Finally the plaintiff is given the opportunity to summarize his testimony upon this subject, and he says (Rec. 153):

"When the first appropriation [by Congress] was made in 1888 (as no appropriations were made between 1886 and 1888), the appropriation was about $75,000. I said to myself, 'Mr. Baker is pretty near right.' In a short time, or in the course of two or three months, another appropriation was made of a good size, but yet an appropriation of such a size that I said to myself, 'Well, Baker has done better than I thought,' for it was an appropriation that brought the fees up to more than I expected, but not to such an amount as I would kick upon it. In October, 1888, a still larger one was made, somewhere in the vicinity of $110,000, and that surprised me. Immediately after that, or at least during the winter of 1888 and 1889, I went into the Treasury, and as I said I did, got a list of these cases where powers of attorney had been given to Mr. Baker; I took them off. I then took the executive documents, and I made out another list in which would be brought down the amounts and I added these amounts up. It was not until probably along in the early part of the summer or late in the spring of 1889 that I was convinced."

On cross-examination he is asked (Rec. 153, bottom of page):

Q. Then when you made up your mind that you had been intentionally wronged, it corresponded then precisely with your "thoughts and meditations," did it not?

A. No, sir.

Q. What was the difference between what you suspected in your thoughts and meditations; what was the difference in fact in your mind as reduced to writing and the facts that you discovered in 1888?

A. The difference was the same that would be between a peanut stand and a grocery store. My supposition was, at least, that the claims might run over one hundred to one hundred and twenty-five thousand dollars, instead of seventy-five thousand, but I had no idea, until after the appropriation in October, 1888, that there was any such amount.

Q. Then the fact is simply this: as time wore along and you carried this sale in your mind, you reached the conclusion that you had made a bad bargain, and you desired Mr. Baker to make some remuneration for that purchase?

A. Well, I came to the conclusion after these appropriations had been made *that I had been deceived terribly* in the amount of *future* business, and the only question that arose in my mind was, did Mr. Baker know of this amount of future business at the time when he made the sale.

Mr. Cummings, it will be remembered, has already told us that from the schedule, H. M. B., No. 3, placed in his hands the day after the sale, he had before him the fact that about $32,000 in fees had been earned from the appropriations of 1886, provided those fees were twenty-five per cent. of the gross amount; but, he says, he reconciled that fact with the statement of Mr. Baker that they were entitled to only $20,000 or $22,000 of fees in those cases, upon the latter's explanation that the fees in some of the cases were only ten, fifteen or twenty per cent., the difference going to "local attorneys," viz., attorneys who had sent them the cases. And, he says, while it surprised him that there should be so much as that, still, what was disturbing him was not the fear that any great mistake had been made as to the cases of 1886, but that, *perhaps*, Mr. Baker

had underestimated what he calls the "future business," viz., the amount of cases from which fees were to be derived from future allowances and appropriations. Thus, at page 140, he says, upon cross-examination:

Q. Now, tell us, if you please, why it was that with that paper [H. M. B., No. 3,] and with the blank checks in your possession signed by him, and with the bank book in your possession, and the checks in your possession for his purchase from you of your interest in these claims—of fifteen thousand dollars—why it was that you sat down and wrote what you call your "Thoughts and Meditations," with all this information in your possession and not calling his attention to what you thought was a misrepresentation of things?

A. Simply because the idea that he had misrepresented the fees in the cases—say, in 1886—never came into my mind, but I did have some doubts, if I may so call it that, about the number of cases that could come in *thereafter;* my doubt was as to the *future* cases; he said eighty thousand, and I thought that, perhaps, there ought to be more; but Mr. Baker knew all about it; I knew nothing.

Q. But you had, as I understand you, every fact in your possession at the time you penned your "thoughts and meditations"?

A. No, sir; I did not.

Q. Well, how long after the 6th of September was it after (sic) you wrote those thoughts and meditations?"

A. Within a few days.

Q. Then you did have in your possession the evidence that you have testified to, to wit, Exhibit H. M. B., No. 3, and the Congressional documents, the checks by Mr. Baker, signed in blank, and the checks for fifteen thousand dollars for the purchase of your interest at the time?

A. I did.

Q. Then I want to know why it was that when Mr. Baker came in you did not at once speak to him about this transaction as being unfair?

A. Simply because there was no idea in my mind of *unfairness* as regards the fees of 1886, and in regard to the prospective business, I took Mr. Baker's word, *and time would only develop* as to whether he was right or whether he was wrong.

Q. Well, why was it that you could entertain such thoughts and put them upon paper three days after you made this sale to him with all the evidence that went to make up this sale in

your possession, and not call his attention to any misgiving when you first saw him?

A. *All* that I had in my possession at the time, or had seen at the time, was simply the schedule of cases *that had been* paid, and Mr. Baker's check book.

Mr. Johnson: That does not answer my question. The examiner will please read it.

Q. (Question read.)

A. Simply because I did not have all the evidence that went to make up the sale; I had only the evidence of the amount of claims that were *being paid in 1886*, but I had no evidence whatever of the claims *in futuro*.

Q. But you had a misgiving, or otherwise you would not have reduced it to writing.

A. That does not follow at all.

Q. Would you reduce thoughts to writing that you knew had no foundation in fact touching the integrity of your partner?

A. I would for the very reason that I had fears that the cases *in futuro* were more than Mr. Baker had represented.

Q. Then having reduced these fears and suppositions to writing, three days after the consummation of the sale,* and with all the evidence that advised you at the time as to the condition of the cases which you sold, why was it, when you saw Mr. Baker again, you didn't tell him of the misgiving that you had in that transaction, but waited for three years before you divulged the fact to him?

A. Simply because my fears had nothing to do with the case, they were then being paid or had been paid, but as to the amount of *future* business, and *that* Mr. Baker had stated at a certain amount, for I had asked him; when he came home he would have given me the same answer, and time would only tell, by the decision and payment of these cases, as to whether he was right or wrong.

Q. Why did you wait three years before you opened this subject to him?

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*It is evident from the questions of the learned counsel for the defense, that he is under a misapprehension in regard to the time when these "Thoughts and Meditations" were *first* reduced to writing. The paper itself, although presented as a whole, shows on its face that it was written at differeut times, mostly on the very day of the occurrences narrated, except where it is clearly a narration of past events. The writer puts his verbs in the present tense, and speaks of things as happening just about or shortly before the moment of writing, and the matters he is making a record of occurred at, or shortly before the time of the assignment. A few days after the assignment these "thoughts" were then put in writing as an entire paper, the same language being retained. The latter portion only of this paper was composed *after* the assignment. The defendant's counsel, however, seems to suppose that the whole paper was first written *after* the assignment was made.

A. Because I had no facts to go on prior to that time.

Q. Haven't you testified that you obtained this information at the next appropriation by Congress?

A. No, sir; I did not.

Q. Haven't you testified that you obtained the facts that led you to believe that everything was not fair in 1888?

A. Yes, sir; late in the fall of 1888.

Q. Why did you not then speak to him about it the moment you ascertained the facts which gave grounds to your suppositions in your "thoughts and meditations?"

A. Simply because I wanted to see what the whole amount was—how many were coming in. As I recollect, the first appropriation in the spring of 1888 was somewheres about seventy-five thousand dollars, and my first impression was; well, Baker was pretty near right; he said seventy-five to eighty thousand and he struck it pretty near right; in a few months another appropriation was made, and then I thought well, this exceeds what Baker said; there came another appropriation along in October, 1888, for much more, and then it was that my suspicions began to be aroused.

Q. I want to know—You gathered together all these facts which you say finally warranted you in what you asserted in your paper, and waited for a lapse of time which the statute of limitations would bar, before you spoke to him about it?

A. I did not wait any great length of time *after I had discovered the real standing of these cases.*

As we have in the presentation of this case preferred to quote from the defendant's own testimony, so when necessary to quote from the plaintiff's testimony, we prefer to take his cross-examination, because there, if any where, is the story to be weakened if it be false. The foregoing extract needs no apology for its length. The *truth* is what is being sought by the court, and the purpose of this brief is to present it in all the fullness which may be attained within reasonable limits.

So then, if in a purchase by a managing partner from his co-partner, without equal knowledge, of the latter's interest in the firm the selling partner has a right to rely upon the knowledge of the purchasing partner, to confide in his statements and act upon them, to proceed upon the theory that his partner is correct, until subsequently developed facts prove him to be incor-

rect, to refuse to play the part of a mousing detective; but, on the contrary, to turn a deaf ear to suspicion and to go to sleep in his overconfidence, until against every effort to resist the impression he is forced by the slowly developing facts to doubt and, finally, discredit the man towards whom the law says he was justified in extending the most unlimited confidence. If the law justifies and sustains (as it undoubtedly does) a selling partner in trusting to the utmost limits the statements of the purchasing partner, when the latter possesses, or claims to possess, the facts upon which the sale is made, and the former is ignorant of them, then no laches—not the slightest, are chargeable to the plaintiff in this case. He did all that any partner could be expected to do. He waited, as he had a right to wait, until the happening of the only event by which the correctness or incorrectness of his partner's estimate of the *future* business could be established. Not waiting with the suspicion lurking in his heart that his partner was a cheat, but waiting to find out how near to, or far from, the true figures his partner's estimate varied. He believed that they had been underestimated, not *mala fide* but *bona fide*. He believed that instead of $75,000 the amount would *perhaps* reach $100,000 or $125,000, and if that had been the extent of the *error*, as he would have then called it, this suit would never have been brought, but when he discovered, by the appropriations made, that instead of $75,000, they exceeded $280,000, he was justified in saying that there had been either a terrible mistake or, as Cumming's himself calls it, "a terrible deception." Even then he hoped that Baker would right the wrong. He was averse to bringing the matter into the courts except as a last resort. He proposed arbitrat.on; argued and corresponded with him about it, and only when all else failed, filed his bill in a court of conscience.

But it has been charged by the defendant's counsel that this suit would never have been brought had Baker not filed his suit at law. Even if that were true we do not see how that fact

can constitute a defense, for the camel may bear the wrong of overweight up to the last feather, and so a man may submit to be wronged up to a certain exasperating point and then rise up in his wrath. But in the case at bar the Court will not fail to observe that for several months before this litigation was determined upon it was made plain to Cummings that Baker intended to institute his suit at law. Was it bad practice—as a lawyer—to wait a short time until that suit was begun and then file his bill to enjoin it, to set aside the sale, and for an account? Many good practitioners would have advised such a course as the best practice, and it was the course pursued by Cummings, for on the 14th of October, 1889, a short time prior to the commencement of this litigation, we find him writing to the defendant: "I shall be ready to accept service at any time. but would rather you would *begin* the fight." Plainly he had determined upon suit, but knowing the defendant was sure to sue, he adopted this as the best practice.

But even if there were laches, that is to say, delay in the bringing of this suit, even if we concede that three years and four months is an unreasonable delay, although the Supreme Court did not think *nine* years too great delay in Brooks *vs.* Martin, nor the same period in Kilburn *vs.* Sunderland, yet *delay of itself* is not a ground for refusing relief. There must be something *more.* The defendant must show that by reason of the delay, he is either not able to produce his proofs to the same extent that he would have been able to do at an earlier date, or that there has been such a change in the situation of the property sued for that it would now be inequitable to require him to surrender it; as if, for illustration, it were real estate, and he had made extensive improvements or something of that sort. There is not the slightest hint that anything of this sort has occurred. The proof, so far as it relates to the amount of the business is entirely *documentary*, and the only two witnesses as to the conversations had, it is conceded, are the plaintiff and defendant. There being therefore no loss of evi-

dence and no change in the situation; how paltry must appear the plea that the defendant should be allowed to keep the plaintiff's money, because he has not asked for it sooner.

"The death of witnesses and loss of evidence and destruction of books are important elements in determining whether lapse of time constitute laches." Bates on Partnership, 952 Am. and Eng. Ency. til., Partnership, 1283.

"Under peculiar circumstances, however, excusing or justifying the delay courts of equity will not refuse their aid in furtherance of the rights of the party; since in such cases there is no pretence to insist upon laches or negligence as a ground for dismissing the suit." 1 Story, Eq. Jur., § 259.

"Although limitations may be relied on as a general rule, it is subject to exception; and while a court of chancery respects the general rule, it must in the exercise of its discretion, regard the peculiar circumstances of every case." Medford's Eq. Pl., 318.

"But as pleas of the statute are admitted in courts of equity by analogy only, it follows that when the circumstances of the case are such as to make it against conscience to apply the rule founded upon analogy, the Court will not enforce it." Collyer on Partn., § 375.

In Neblett *vs.* MacFarland, 92 U. S., 101–105, the Court said:

"The party defending is not bound to rescind until the lapse of a reasonable time after discovering the fraud. * * * Parties engaged in a fraudulent attempt to obtain a neighbor's property are not the objects of the special solicitude of the courts."

"If a party has a clear right in equity with no remedy at law, if it appears that no unconscionable result will follow relief, mere delay in bringing his action will not cause a court of equity to refuse it." Spurlock *vs.* Sproule, 72 Mo., 503.

"Length of time *alone* is not evidence of staleness." Paschell *vs.* Hinderer, 28 Ohio St., 568–580.

"Courts in some cases have, notwithstanding great delay, inquired into the equities between the parties, and, where it is apparent that justice could be done, have given relief." Am. Cyl., and tit. Laches, p. 541.

"When the delay has worked a wrong to the adverse party, who has thereby been induced to do something, or to abstain from doing something, the plaintiff is usually deemed to have precluded himself from relief, and it has been held that *so long as the relative position of the parties is not altered* to the *defendant's prejudice, delay* is of very little consequence." Am. Cyl. L. tit. Laches, p. 454, citing Nadd *vs.* Powers, 136 Mass., 273; Daggers *vs.* Van Dyke, 37 M J., Eq. 130; Platt *vs.* Platt, 58 N. Y., 646; Wollaston *vs.* Tribe, L. R. 9, Eq. 44–50; *ex parte* Adamson, L. R. 8 Ch. Div. 807–817; Ridgeway *vs.* Newstend, 3 De G. F. and J., 474–485; Lindsay Petr. Co. *vs.* Hurd, L. R., 5 P. C., 221; King *vs.* Anderson, 1 R., 8 Eq., 625.

In Wollaston *vs.* Tribe, L. R., 9 Eq., 44–50, a bill was brought in 1868, to set aside a marriage settlement executed in 1858, on the ground of fraud and mistake. LORD ROMILLY, N. R., said:

"Great stress was laid on the lapse of time; but I think nothing of that, because all the persons interested are in the same state now as they were then. If there had been any dealing with an altered state of matters, that might have raised a question, but there is nothing of that sort."

In ex parte Adamson JAMES, L. J., 807, 817, said:

"Nobody ought to be estopped from averring the truth or asserting a just demand, unless by his acts or words, or neglect his now averring the truth, or asserting the demand, would work some wrong to some other person who has been induced to do something or to abstain from doing something, by reason of what he has said or done."

Where a delay of thirteen years had occurred, but the evidence in support of the claim was *entirely documentary*, and there had been no *change* in the situation of the parties, it was held that mere lapse of time was no bar. Cranmer *vs.* McSwords, 24 W. Va., 594, 601.

A lapse of time imputed as laches may be excused by the obscurity of the transaction, whereby the plaintiff was disabled from obtaining full information of his rights. Murray *vs.* Palmer, 2 Sch. and Lef., 474, 487.

Lapse of time will not prejudice a person who has title while seeking a discovery of that title from persons who have possessed themselves of the evidences of it. Bond *vs.* Hopkins, 1 Sch. and Lef., 413.

In Daggers *vs.* Van Dyke, 37 N. J., Eq. 130, which was a suit brought to reform a deed, the Court said:

"The delay of the complainant in seeking redress constitutes no defense. It is only when the complainant has slept over his wrongs so long that great and serious wrong will be done to the defendant, that laches constitutes a complete defense. Here the parties are in almost exactly the same position that they were in at the time the wrong for which redress is sought was done, and relief may be given to the complainant without doing any harm whatever to the defendant."

In Loring *vs.* Palmer, 118 U. S. 321, a partnership case, one of the partners was led by the misrepresentations of the other to believe that he owed him a balance in respect of the venture, and on that account delayed from 1868 to 1875, enforcing his interest therein. In point of fact, so far from owing anything, the other was his debtor. It was held that as his delay was caused by his belief that he owed his partner money, which belief was induced by the latter's misstatements, no advantage could be taken of the delay in order to bar an action.

"Delay in filing a bill may be explained by negotiations which have taken place between the parties with a view to a compromise, and it would appear that the plaintiff may explain his delay by showing that it was consumed in repeated efforts to obtain a remedy from the defendant without litigation. Am. Cyl. til. Laches. 561."

Where the object of the suit is property which fluctuates in value, as mining property, the plaintiff of course cannot lie by

and wait until the property rises in value before bringing his suit to set aside the sale. Said Miller, J., in Twin Lick Oil Co., *vs.* Marbury, 91 U. S. 587.

"While a much longer time might be allowed to assert this right in regard to real estate, whose value is fixed, on which no outlay is made for improvement, and but little change in value, [all of which elements exist in the case at bar] the class of property here considered, subject to the most rapid, frequent and violent fluctuations of anything known as property, requires prompt action in all who hold an option, whether they will risk its shares or stand clear of them."

"As the courts have never prescribed any specific period as applicable to every case like the statute of limitations, the determination as to what constitutes a reasonable time in any particular case must be arrived at by a consideration of all its elements which affect that question." Twin Lick Oil Co. *vs.* Marbury, 91 U. S., 487.

We submit, therefore, that the bill was filed within ample time after the discovery of the wrong done. Baker knew that he had done the wrong, knew it from the day of the sale. From that date he knew, as a lawyer, that Cummings was *equitably* interested in the inspector cases, notwithstanding the alleged assignment. He knew that if Cummings should discover it, there would, in all probability, be a calling to an account. In such a case the Supreme Court has decided that laches cannot be pleaded as a defense. In Insurance Co. *vs.* Eldridge, 102 U. S., 546, it was held that when the defendant has knowledge of the equities of the complainant, he cannot plead laches as a bar to the suit.

The Auditor's Report.

The last question is as to the correctness of the Auditor's report, which report, it is to be observed, confirms in every particular Cummings' testimony in the case in chief as to the amount of fees already collected by Baker at the time of the assignment and the amount collected by him afterwards.

The decree (Rec. 201) under which the auditor's account was stated is as follows:

"This cause coming on to be heard upon the bill, answer and testimony, and being argued by counsel, upon consideration thereof the Court doth, this 16th day of March, 1894, adjudge, order and decree as follows:

1. That the agreement and receipt dated the 6th day of September, 1886, in the bill and proceedings mentioned be, and the same is hereby, cancelled and annulled.

2. That the plaintiff is entitled to an accounting by the defendant of the fees received from all the so-called inspector cases embraced in and covered by said receipt and agreement, said accounting not to include fees for business received by the defendant after the dissolution.

3. That there be also an accounting of and concerning all the other partnership matters (other than the said inspector cases not embraced in the said receipt and agreement); and in stating the account the defendant is to be allowed one-half of all the fees and commissions which the plaintiff received or reasonably should have received by reason of the assignment to H. G. Cooke & Co.

4. That this cause be referred to the auditor to take and settle the aforesaid partnership accounts, and in the execution of this reference he shall consider the evidence already in the case and such other evidence offered by either party which the auditor may deem relevant and pertinent.

5. That the auditor shall give due notice of the time and place of executing this reference and shall report his proceedings under this decree to the Court for its action.

It is further ordered and decreed, that in stating the account of fees there shall be deducted from the amount received by each party such sums as were properly paid by such party to other attorneys, together with such other proper expenses as may have been incurred by the parties respectively in the conduct of the partnership business; and in stating such accounts the auditor shall compute interest upon the respective balances from the date of dissolution of the partnership."

I.

In the execution of this reference the defendant (appellant) was called upon to produce a statement of the fees collected by him prior to the dissolution of the partnership, to wit:—September 1st, 1889.

The statement was accordingly produced (Rec. 259), and it more than corroborates the plaintiff's charge as to the amount of the fees received by the defendant of the so called inspector cases. He, the appellant, there states it at $104,997.67, one-half of which, $52,498.83, would have been the share of the plaintiff. It also appears that of this amount $32,977.51 had at the time of the sale been already allowed and (or within a few hundred dollars thereof) been collected by the appellant. So that the evidence before the auditor establishes of itself our assertion that at the time of the alleged assignment the very money ($15,000), which was paid over to Cummings by Baker as a consideration therefor, was considerably less than what would have been Cummings' own share of the fees already collected had no assignment been made.

Notwithstanding so plain a case of outrageous overreaching, the defendant insisted before the auditor and, although overruled both by him and the court below, continues to insist before this Court, that there was by reason of said assignment (obtained as this Court has declared not only by misrepresentation of the known facts but without consideration) a *de facto* if not a *de jure* dissolution of the partnership in consequence of which he is entitled, he says, to charge the plaintiff $42,700 for the collection of $35,588.51 of plaintiff's share of fees accruing after the alleged assignment! The monumental audacity of such a claim is on a par with the position taken by the defendant throughout this entire case.

The language of the Auditor in respect of this claim for "extra services" is as follows (Rec. 223):

"Cases are cited in which extra compensation has been allowed by courts to a surviving or remaining partner for services rendered in continuing and conducting the partnership business after the death or withdrawal of his co-partner, but each of these cases is that of an *absolute* dissolution of the partnership relation. In this case, in my judgment, the decree of the court annulling the assignment or sale has the effect of reinstating the partnership as it existed prior to that sale, as

to the inspector cases, and to continue that partnership until the complete or general dissolution in September, 1889. In this view of the case we must treat this claim of the defendant as that of one member of an active existing partnership for an extra share of the profits realized from the joint business, on the ground of contributing to that business a greater amount of time and service than his co-partner, ***a claim which cannot be maintained under any authority of text writers or adjudged cases, so far as my inquiry extends.***"

The case of Denver *vs.* Roane, 99 U. S. 355, is directly in point in respect of tnis claim for "extra services." That was, as in the case at bar, a bill for an account between two attorneys, who had been partners. A claim was made by one of them for extra services on the ground that he had contributed more labor to the firm's business than his co-partner; but the court held that a partner could not without ***an express stipulation*** to that effect recover extra compensation. That his entire services were due the firm without charge therefor.

But even if it were the law to allow a partner extra compensation because he had done more work than his co-partner, nevertheless, Baker could make no claim of the sort for three reasons; First: Because it was well understood and agreed between the two partners that the business of the office should be divided, Baker taking what was called the "revenue cases," in which category fell the so-called inspector cases, and Cummings taking the war claims. Cummings says that Baker "had exclusive and entire charge of all these [inspector] cases." This is not denied by Baker, indeed he says, "He [Cummings] generally took charge of what was known as the old war claims, and I had *everything* arising out of the revenue laws."

The business being thus divided, it was Baker's duty to give his entire attention to these cases, while Cummings attended to the "war claims," and neither would be justified in complaining of the other because more labor was given in their respectively assigned departments than to those outside of them.

Secondly. It is not a fact that the prosecution of these inspector cases involved any great amount of labor, for after the decisions in Adams *vs.* U. S. 20 Ct. of Claims Reps. 115, the prosecution of the cases consisted of but little more than the filing of a letter in each case and receipting for the amount payable.

Thirdly. Because Baker practically concedes that he did no more work in these cases *after* the so-called assignment than he did before.

"Question. Did you, as a matter of fact, do any more work in these cases after the 6th of September, 1886, than you would have done if the paper of that date had not been signed by Mr. Cummings?

Answer. It is impossible to answer that question directly for the reason that if the sale had not been made the firm would have been dissolved and each would have managed whatever business he had or could procure.

Q You have testified as a matter of fact, that you did all of the work in these inspector cases, have you not?

A. I have.

Q. Before the assignment?

A. Before the assignment, and I did it afterwards.

Q. And did no more afterwards than you did before?

A. I have not said so.

Q. I ask you as a matter of fact.

A. I think I did more because there was a greater number of cases on hand.

Q. If you did nearly all the work before September 6, 1886, in these cases, what more could you have done after the assignment, after that date?

A. I think that is evident if there were more cases.

Q. There were more cases, but in each of the cases did you do any more work?

A. Some cases required more work than others, and there would be no way that could be ascertained except by taking up each specific case and comparing them.

Q. Did you do any more work upon that class of cases after that date, the 6th of September, 1886, than you had been doing upon the same class of cases before that date?

A. I could not say positively whether I had worked fifteen minutes per day more or less on one side or the other.

Q. Did you do any more work in proportion to the work Mr. Cummings did?

A. I think I did. Mr. Cummings very seldom did any work in the last three or four years.

Q. Did he do any more work before the assignment than he did afterwards?

A. I think he did. His work diminished from the time we entered into the partnership until the end of it.

Q. But you concede that you did nearly all the work in these cases and continued to do all after the assignment?

A. *Substantially.* (Rec. 239.)"

At p. 250 of the Record, Mr. Cummings says that he did, if anything, more work for Baker on the inspector cases after the assignment than he did before, for the reason that Baker was absent from the city to a greater extent than ever, and that he, Cummings, "did all the work I [he] was asked to do or was called on to do."

II.

The defendant claims in his brief that after the assignment he not only continued the business then on hand, but obtained new and lucrative business, viz., inspector cases to the amount of some $65,000.

It is submitted that there is no proof whatever that these cases were obtained after the assignment of September 6, 1886, other than Mr. Baker's own statement, but if it were true that these cases came into the office after that date, they came to the firm of Cummings & Baker, and Mr. Baker has no more right to claim credit for them on that score than has Mr. Cummings.

III.

The defendant objects to the allowance of interest on the amount found due by the Auditor on the ground that it is an allowance "of interest upon interest."

By the report of the Auditor it will be seen that he finds the defendant (after allowing him one-half the fees from the Cooke assignment, which had not then been earned) to have been indebted $27,916 to the plaintiff on the 1st of September, 1889,

(the date of the dissolution of the partnership) with interest thereon to July 1st, 1895, making the total sum due and payable to the plaintiff on the 1st day of July, 1895, $37,489.10. Subsequently the plaintiff for reasons hereafter appearing allowed the defendant an additional credit of $4,875.56, thus cutting down the sum total to $32,772.14. This sum was due and payable to the plaintiff on the 1st day of July, 1895. The defendant refused to pay it. Why should it not bear interest? It was the sum due the plaintiff at that time and which the defendant should have paid at that time. Not to allow interest upon it is to encourage and reward the defendant in delaying its payment as long as possible and so the courts have held. Thus in Hammond *vs.* Hammond, 2 Bland ch. 306 at pp. 371–380, the court says:—

"The auditor in a creditor's suit always makes a statement of the claims, allowing interest to each if entitled to it, and the aggregate thus shown is considered as *the liquidated debt due to each* and an order confirming such a statement is a judgment of the court in favor of each creditor which like a judgment at law converts the interest into principal. Interest is therefore to be computed from that time found upon the aggregate amount."

To the same effect is:

Stuart *vs.* Gay, 127 U. S. 518, at page 531.
Childers *vs.* Dean, 4 Randolph, 406, 408.
Fitzhugh *vs.* McPherson, 3 Gill, 409–428.

IV.

The claim of the appellant that "the additional credit of $4,870.56 allowed to the appellant by the decree" should be deducted from the $27,916.57 allowed appellee by the auditor seems to arise from a misunderstanding of the decree. It was shown before the auditor that Mr. Cummings in his administration of the Cooke assignment had up to the date of his accounting before the auditor collected *no fees whatever* out of

the $104,977.91 which had come into his hands, but that he held certain securities now unsalable as a guarantee for their final payment. The auditor notwithstanding charged Mr. Cummings with one-half of five per cent. upon the amount collected. His report upon this matter being as follows:

"I am directed by the order of reference to allow the defendant in this account one-half of all the fees and commissions which the plaintiff received or reasonably should have received by reason of the assignment of H. D. Cooke & Co. The deed of assignment of this firm to the plaintiff, which is filed as an exhibit in this reference, provides that from the proceeds coming into the hands of the assignee there should be first paid the expenses of sales and collections and of preparing and executing the trust, including a commission of five per cent. upon the amount of said sales and collections for his services in the discharge of the said trust. The sum of these sales and collections as testified to by the plaintiff in the reference is one hundred and four thousand nine hundred and seventy-seven dollars and seventy-one cents, upon which amount the plaintiff was entitled to retain the sum of five per cent. as provided by the deed of assignment. He testifies that he did not retain any sum for his commission or fees, but that he holds certain securities as a guarantee for their final payment. I think that for the omission to retain these commissions from the moneys coming into his hands the plaintiff is alone responsible, and that the defendant is entitled to one-half of the sum which should so have been retained. I have therefore charged the plaintiff with these commissions as if they had been retained or collected by him. It appears in the testimony in this cause, on page 67 of the printed record, being the testimony of the plaintiff, that the sum he *had expected* to charge for services under this assignment, including commissions on the collections and payment, was fifteen thousand dollars, and it is claimed here that in view of his testimony, he should be charged with that sum as being the fees and commissions which he should reasonably have received. Notwithstanding the evidence of the plaintiff on this point, I do not feel justified in charging him in the account a greater sum than that stipulated by the deed of assignment in view of the fact that there may be objections to any further or greater allowance to him and such allowance may not finally be made."

The court below overruled the plaintiff's exception to this finding of the Auditor, and went even further in favor of the

defendant, for upon the theory that the plaintiff *might perchance* be allowed this $15,000 on the final closing of the assignment the learned judge proposed to leave the decree so far open in respect to this matter as to allow the defendant to come in *at any future time* and pray for a further allowance at the foot of the decree in case he should be able to show that the plaintiff had received a greater allowance than the five per cent. stipulated for by the deed of assignment.

To this proposed action the plaintiff strenuously objected on the ground that it would be not only leaving him open to further litigation, but would also deprive him of the benefit of a *final* decree to which he insisted he was entitled. To avoid, therefore, the insertion of such an irregular clause or proviso in the decree and to bring this already wearisome litigation to an end, the plaintiff *of his own motion consented* to make a *gratuitous* allowance to the defendant of the difference between the $2,624.44 allowed by the court and the $7,500 claimed by the defendant, to wit, the sum of $4,875.56. The language of the decree in regard to this matter being "and the plaintiff now in open court *consenting* to the defendant being allowed, in addition to the allowance made by the Auditor to the defendant in the matter of the Henry D. Cooke assignment the further sum of four thousand eight hundred and seventy-five dollars and fifty-six cents," &c.

There is no reason therefore why the defendant should be allowed interest on a sum of money gratuitously allowed him by the plaintiff—money which the plaintiff has never received and may never receive. The allowance of the $2,624.44 was erroneous, and the fact that we have not further carried our exception to its allowance does not make it any less so. The Cooke assignment was entirely out of the scope of the partnership business which the plaintiff and defendant were engaged in, and the defendant had consequently no more right to share in the plaintiff's profits therefrom, had he received any, than the plaintiff would have been entitled to share in the profits of

any real estate investments of the defendant. This very question has been decided by the Supreme Court of the United States.

Each partner is the agent of his co-partner in all transactions relating to partnership business, and is forbidden to traffic therein for his own advantage, and if he does, will be held accountable for all profits. ***But beyond the line of the trade or business in which the firm is engaged, there is no restraint on his right to traffic.*** As one partner has no authority to bind the firm outside of their ordinary business, ***he cannot, of course, be held liable to account,*** should he make a profitable adventure in a matter not legitimately connected with the business of the firm.

V/heeler *vs.* Sage, 1 Wall 518 at p. 528.
Latta *vs.* Kilbourne, 150 U. S. 524, at p. 549.
King *vs.* Whiton, 15 Wis. 684.

It is said, however, that in the case of a law partnership the commissions which one of the partners receives in serving as a trustee, executor, etc., is divisible with his co-partner as part of the partnership earnings. It may be that some law partners have treated them as such, but it could, we submit, only be so by concession or previous agreement, and not by any edict of the law. King *vs.* Whiton, *supra*. But conceding for argument sake that such is the law in respect of partners engaged in a general practice where the members of the firm are constantly being appointed trustees in partition suits, receivers, etc., by the court, and conceding that because of their general practice of the law such appointments come to them through their connection with their clients; nevertheless such was not the case with the firm of Cummings & Baker. The record shows that they were not engaged in any practice before the Common Law Courts. Cummings himself was not even a member of the bar of the law courts of the District, and it was even disputed by Baker that he was a member of the Court of Claims. The only business of the firm was the prosecution of claims

before the Departments. There is no evidence whatever that either member of the firm ever acted as trustee or executor, or that either of them ever had a client who sought their services in the common law courts. Henry D. Cooke was never a client of the firm. He was a banker who was largely indebted to Cummings.

"When Mr. Cooke failed he was owing me a large amount of money, and I took the assigneeship for the purpose of seeing if by means of the assigneeship and of the fees coming therefrom I could in any way repay myself the amount that was due me." (Rec. p. 32.)

For the same reason, or want of reason, it might be said that when A, one of the two partners, is elected to Congress he should share his pay with his co-partner because the people seek out lawyers to elect them as Congressmen, and therefore if A hadn't been a lawyer he wouldn't have been a Congressman.

But Baker says it was a part of the agreement that Cummings should divide his fees in the Cooke assignment. This is denied by Cummings, and the burden of proof is on Baker to establish it. Cummings says:

"The prospective fee in the H. D. Cooke matter never played any part in this trade for the reason that Mr. Baker time and again told me, 'Well, you will never get anything out of that case,' but when the trade *was made* Mr. Baker said, 'Of course I shall claim nothing of whatever you may obtain in the H. D. Cooke case.'" (Rec. 134.)

This was generous of Baker considering that he never was entitled to claim anything out of it.

The defendant therefore has been very liberally dealt with both by the court and the plaintiff. The money allowed him was a pure gratuity and of course he is not entitled to interest upon it. The decree should be affirmed.

FRANKLIN H. MACKEY,
Solicitor for Appellee.